Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
Petitioners,

v.

UNITED STATES OF AMERICA;
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether defendants must prove they "would probably" have been acquitted in order to obtain a new trial for convictions based on perjury by a government employee and member of the prosecutorial team, an issue as to which the courts of appeals are in conflict.

2. Whether defendants were deprived of Due Process under the Fifth Amendment and their right to trial by jury under the Sixth Amendment by affirmance of convictions on charges that expressly adopted and were intertwined with other counts necessarily dismissed for taint of perjury.

3. Whether defendants were deprived of Due Process under the Fifth Amendment for being convicted of billing fraud, when their bills complied with federal regulations but were contrary to a state handbook that was never adopted as a formal rule or regulation.

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PETITION FOR A WRIT OF CERTIORARI

Robert T. Mitrione and Marla A. DeVore respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 357 F.3d 712. The opinion of the district court (App., *infra*, 40a-49a), which vacated most but not all convictions, is unreported. The opinion of the district court (App., *infra*, 18a-22a), which denied a motion for partial dismissal of the indictment, is reported at 160 F. Supp. 2d 993.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 9, 2004. A timely petition for rehearing was subsequently filed on February 23, which was then denied on March 25 (App., *infra*, 50a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST., AMEND. V.

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST., AMEND. VI.

The Supremacy Clause provides in relevant part: "[T]he Laws of the United States ... shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., Art. VI, cl. 2.

The federal regulatory policy for "incident to" billing states in relevant part: "[T]he physician (or other practitioner), under his or her discretion and license, may use the service of anyone ranging from another physician to a medical assistant." 66 F.R. 55246, 55268 (Nov. 1, 2001).

STATEMENT OF THE CASE

"Her trial testimony was false. Her testimony that the 1,178 undocumented claims did not include claims for services rendered at a hospital **was false to a dramatic degree**." App., *infra*, 43a (emphasis added). So held the district court below in a prosecution brought by the United States for billing fraud. The judge was referring to the testimony by state employee Ms. Deanna Statler, who served as a member of the federal prosecutorial team itself. She was the star witness for the prosecution in proving criminal intent by defendants. The prosecutorial theory was that defendants' small medical practice intentionally overbilled the government, relying on Ms. Statler's testimony about an overwhelming number of filed claims that lacked supporting documentation. The court below later found this testimony to be a complete lie.

At trial the prosecution had called Ms. Statler to the stand for the very purpose of countering defendants' evidence of lack of intent to defraud. The prosecutor relied heavily on her testimony that a remarkable 28% of defendants' invoices were for undocumented services, a far higher rate than the missing bills for services rendered (9%). App., *infra*, 51a. Her testimony was designed to disprove carelessness as the cause of the poor documentation, and to prove an intent to defraud the government. The prosecution emphasized this in his closing argument:

> Deanne [sic] Statler, you heard from her regarding the percentage, the fact that three times more bills were sent out when no service was provided than otherwise.

C.A. App. 193.

The prosecution drove the point home further with the jurors:

> The Public aid auditor [Ms. Statler] says she looked through hundreds of records and no treatment notes [and the] benefits paid, 28 percent. No treatment notes, 9 percent. Those are the numbers that should matter . . . . If you look at all the records as this Public aid auditor [Ms. Statler] did, and you come up with three times more billed than not billed, accident? Be kind of weighted a little more evenly if it were an accident, wouldn't it?

C.A. Record Doc. 279, p. 2716; *see also* App., *infra*, 45a. This was the prosecution's primary evidence of fraudulent intent, and the jury returned convictions against defendants on most charges on September 13, 2001.

But in post-trial hearings, the trial judge found Ms. Statler's testimony to be utterly false. Her testimony about fraud was not merely wrong, but it was "false to a dramatic degree." App., *infra*, 43a. Ms. Statler had even testified that she "would have allowed [only] 14%" of defendants' claims, conveying to the jury that 86% of defendants' bills were fraudulent. Record, Tr. July 10, 2001, p. 2311. But her testimony was wrong and the jury had been completely misled.

The prosecutor, the Assistant U.S. Attorney (AUSA) Patrick Hansen, personally prepared the false trial exhibit 20B that graphically illustrated defendants to have engaged in fraud. App., *infra*, 51a. In the post-trial hearing, Ms. Statler confirmed the integral role played by the prosecution in connection with the false testimony:

> Q. [D]id Mr. Hansen then prepare Exhibit 20B?
>
> A. Yes, he did.
>
> Q. And prior to the time that you testified . . . you talked to Mr. Hansen about his preparation of Exhibit 20B, correct?

...

A. Yes, he showed it to me.

C.A. App. 95. Ms. Statler further confirmed prosecutor Hansen "had done the chart on his computer." *Id.* at 114. It was the data presented in Exhibit 20B, including the assertion of 1,178 undocumented claims, that the trial judge later found to be dramatically false. App., *infra*, 43a-45a.

Ms. Statler's post-trial testimony indicated that she played an active and integral role as member of the prosecution team and that she discussed her testimony with the AUSA Hansen. C.A. App. 15 ("I discussed the spreadsheet with Mr. Hansen. And also discussed it with other members of—other investigators."). Ms. Statler further testified that she was on loan to the prosecution team itself and took directions directly from prosecutor Hansen. *Id.* at 74-75; Record, Tr. July 10, 2002, pp. 380, 398-99, 2314-15.

The district court necessarily vacated the primary counts of conviction against defendants. But this remedy for the perjury was without effect. The court sustained two less significant charges totaling only $75.25 in billings, and then meted out the same harsh sentences of 23 and 15 months as though the finding of perjury had not occurred. Specifically, the court affirmed the convictions based on mail fraud (18 U.S.C. § 1341) concerning a mere $25 claim (count 12) and on false claims (18 U.S.C. § 287) entailing only $50.25 (count 14). App., *infra*, 23a-39a.

Counts 12 and 14, however, expressly incorporated and relied upon count 2, which in turn incorporated count 1 and was necessarily vacated along with count 1 due to the perjured testimony. App., *infra*, 36a, 38a; *see also id.* at 16a. Counts 12 and 14 were ancillary and intertwined with the primary charges of fraud, which relied on the perjured testimony. Counts 12 and 14 also required proof of *mens rea*, for which the prosecutor relied on the perjured testimony.

These remaining counts on appeal relate to the bills submitted by defendants for patients LE and BT, respectively. Though the statutory bases for the two counts differ, they rest on the same factual theory: that defendants billed for an assistant when reimbursement was allowed only if the physician himself rendered the service. This is known as "incident to" or "substitute billing" and is commonly allowed by federal regulations so that assistants may perform many medical services instead of an actual licensed physician. The prosecutor relied on a handbook put out by the State of Illinois to bypass the federal rule and disallow reimbursement for these services.

Defendants served a timely appeal to the Seventh Circuit of the district court's affirmance of counts 12 and 14. They argued that the 75-year-old standard of *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), required a new trial because the jury outcome on counts 12 and 14 "*might* have" been different in the absence of the perjury presented by the prosecution's star witness. App., *infra*, 9a. On February 9, 2004, the Court of Appeals for the Seventh Circuit overturned its *Larrison* standard in order to affirm the convictions. *Id.* 10a. The appellate court then denied on March 25 a timely motion for rehearing by the panel. *Id.* at 50a.

The appellate court summarized the "bulky indictment" as consisting of alleged "billing for services that were not provided (ghost billing), overstating what services were provided (upcoding), and billing for services provided by others but declaring that Dr. Mitrione provided the service (substitute billing)." *Id.* at 1a; *see also id.* at 18a-39a (indictment). The trial judge vacated the convictions on ghost billing and upcoding in light of the perjury, and the government did not retry those charges. *Id.* at 48a. Only the substitute billing charges remained on appeal, "the essence of" which was that defendants "assigned Medicaid and Medicare patients to counselors and therapists for treatment and then billed as

though Mitrione either provided the service himself or directly supervised the service." *Id.* at 6a.

The appellate court recognized that defendant Mitrione was enrolled as a Medicare provider and that "[u]nder certain circumstances, Medicare (unlike Illinois Medicaid) allows providers to delegate certain psychological services to others in their employ." *Id.* at 3a. The court also found that Medicare regulations allow reimbursement when the service is "performed under the direct supervision of the physician, nonphysician, or physician-directed center; and [is] initiated or managed by the employing physician." *Id.* However, the court held, without support, that assistants cannot be "unlicensed mental health providers." *Id.* at 3a. In fact, Illinois law governing the practice of medicine does not require licensure of assistants to physicians, and at any rate defendants' assistant did hold a certification as a drug and alcohol counselor. *See id.* at 5a.

Walter Woods served as the assistant to defendants for aiding in the therapy of mental patients. With respect to counts 12 and 14, defendants billed for services that Woods indisputably performed. Defendants did not make expressly false representations about Woods. At trial, the government relied on the opinion of its Medicare expert (Dr. Richard Baer) to claim that defendants used a therapist who was unqualified, when in fact the published federal regulations expressly authorize defendants to use the therapist of their choosing and defendants' bills accurately represented compliance with federal law. But the jury convicted defendants on these counts amid the broader evidence of fraud presented by Ms. Statler, later found to be false.

The appellate court below based its affirmance on its finding that "Statler was really not a material witness with respect to the substitute billing counts." *Id.* at 10a. But that directly contradicted the factual finding of the district court, which expressly held that Ms. Statler *was* a material witness on the

substitute billing charges: "I also find that Ms. Statler was a material witness on the charges related to substituted billing . . . ." *Id.* at 46a. In addition, Ms. Statler's testimony was the primary evidence for proof of intent to defraud, which was essential to the convictions.

The appellate decision below affirmed the convictions only by creating a newly permissive standard for perjury:

> Today, we overrule *Larrison* and adopt the reasonable probability test. In order to win a new trial based on a claim that a government witness committed perjury, assuming as in this case that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons. Defendants will have to show that the existence of the perjured testimony (1) came to their knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) **would probably have led to an acquittal** had it not been heard by the jury.

Id. at 10a (emphasis added). The court then applied this test broadly to where the perjury was by a government employee and member of the prosecutorial team, as Ms. Statler was.

From this permissive standard for perjury and its broad application, defendants petition here for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." *Mesarosh v. United States*, 352 U.S. 1, 9 (1956). Here, the prosecution relied heavily on perjury by a government employee who was directed by the prosecutor. Yet the government insists that the penalty for this highly prejudicial and material perjury

should be essentially nothing and that defendants should be sentenced as though the perjury was not discovered. But "all perjured relevant testimony is at war with justice." *In re Michael*, 326 U.S. 224, 227 (1945).

For 75 years the Seventh Circuit adhered to a rigorous standard discouraging the government's use of perjury in criminal trials, and this standard governs in the Fourth and Sixth Circuits and, under various circumstances, in the other Circuits also. Under this traditional standard, defendants convicted through the use of perjury are entitled to a new trial if the "jury *might* have reached a different verdict" in the absence of the perjury. App., *infra*, 9a (emphasis in original). This venerable standard deterred government use of perjury, defended the right to a jury trial by defendants, and protected the integrity of the judicial process.

The decision below instead adopted a new standard that is permissive of prosecutorial perjury. In a case devoid of any criminal intent, the prosecution resorted to false testimony to convict. Defendants' convictions on a small billing dispute were only affirmed by diluting the standard for perjury, in contravention of 75 years of precedents in the Seventh Circuit, current law in at least four other Circuits, and Supreme Court teachings themselves. The court below, without even affording petitioners their right to attempt to meet the new standard, reversed itself and held that defendants did not prove that the perjury "would *probably* have led to an acquittal had it not been heard by the jury." *Id.* (overturning *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928), emphasis in original).

This Court has never placed the burden on a defendant seeking a new trial to prove that he would probably have obtained an acquittal in the absence of perjured governmental testimony, and certainly not where, as here, the perjury was by a member of the prosecutorial team. This Court's precedents are entirely otherwise. *See, e.g., Napue v. Illinois*,

360 U.S. 264, 272 (1959) ("[T]he false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be *Reversed*."). The implications of the new standard pronounced below are catastrophic for the integrity of the criminal justice system, sacrificing rights of due process and trial by jury.

As shown below, a writ of certiorari is necessary here to resolve the conflict by the decision below with the other Circuits and this Court, and to reverse the deprivation of due process and right to trial by jury that occurred here.

I. THE CIRCUITS ARE EXPRESSLY DIVIDED OVER THE STANDARD FOR A NEW TRIAL BASED ON PERJURY BY A GOVERNMENT WITNESS.

The decision below conflicts with at least the First, Fourth, Sixth and Ninth Circuits in changing the standard for a new trial due to government use of perjury. This issue has fully percolated among all the Circuits and is best presented here for resolution by this Court: the perjury is clear and undisputed, having already necessitated dismissal of nearly all counts of conviction against defendants. Only by adopting a more permissive standard for perjury could the court below affirm the remaining counts of conviction, totalling only $75.25 in fraud yet sending defendants to jail for 23 and 15 months.

The decision below further conflicts in principle with precedents of this Court. Most recently in *Banks v. Dretke*, this Court has emphasized its rigorous standard against deception by the prosecution, reiterating that defendants need not prove that they would have been otherwise acquitted in order to obtain relief. *See Banks*, *quoted infra* Part I.B. Perjury undermines the integrity of prosecutions, and this Court has consistently favored new trials to reduce the

scourge of conviction-by-lies. The Seventh Circuit contravened these precedents in this case.

A. The Decision Below Squarely Presents the Conflict by Expressly Disagreeing with the Fourth and Sixth Circuits, and Also Conflicting with Many Other Circuits in the Scope of the New Standard.

The decision below expressly conflicts with the Fourth and Sixth Circuits concerning convictions based on perjury, thereby compelling resolution by this Court. The lower court implicitly conflicts with the First and Ninth Circuits, and also departs from the Second and D.C. Circuits, as to the scope of application of its permissive rule. Specifically, the court below changed the standard for a new trial because of perjury from whether the "jury *might* have reached a different verdict" to a requirement that defendant prove that the perjury "would *probably* have led to an acquittal had it not been heard by the jury." App., *infra*, 9a, 10a (emphasis in original). The court below then expanded the scope of its permissive test to all situations except where the prosecutor demonstrably knew about the perjury beforehand, thereby allowing perjury where, as here, the prosecutor at least negligently permitted it. *See id.* at 10a.

The decision declared its conflict with the Fourth Circuit, which affirmed its adherence to the traditional *Larrison* standard in *United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000). The Fourth Circuit follows the same standard for veracity that was originally in place during defendants' trial here. Specifically, a new trial must be granted if false, material and surprising testimony was used to convict and the jury *might* have reached a different conclusion. *See id.* at 318. Only by rejecting this traditional standard *post hoc* was the Seventh Circuit able to affirm defendants' convictions and sentences here.

Defendants' right to a new trial thereby depended entirely on which Circuit their case arose in. Had they been convicted in the Fourth rather than Seventh Circuit, then they would have obtained a new trial under the traditional test. The Fourth Circuit *Lofton* decision cited longstanding precedent in its jurisdiction that its courts do not tolerate perjury, and defendants ambushed by it need not prove innocence to obtain a new trial. *See, e.g., United States v. Wallace*, 528 F.2d 863, 866 (4th Cir. 1976) (rejecting any relaxation of the traditional *Larrison* rule). The court below allows perjury that the Fourth Circuit would not, and the fate of defendants victimized at trial by lying witnesses thereby becomes subject to the happenstance of where the trial occurred.

The decision below also conceded its conflict with the Sixth Circuit which, like the Fourth Circuit, adheres to the *Larrison* standard. *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950) (stating that the test requires a new trial if "the jury might have reached a different conclusion"). Where, as here, the government witness recants her testimony after trial, the Sixth Circuit has recently reiterated the need to apply the *Larrison* "might have" standard. *See United States v. Willis*, 257 F.3d 636 (6th Cir. 2001).

In *Willis*, the Sixth Circuit affirmed a district court's grant of a new trial and emphasized that the *Larrison* standard must apply to "situations in which a material witness for the government recants his testimony after the trial." *Id.* at 644. That Circuit maintained that "in more recent cases, we have recognized the [*Larrison* and *Gordon*] test's continuing applicability in criminal cases, and we have applied the test to new trial motions in the civil context." *Id.* (citing *Gordon, supra*). Yet in direct conflict with the Sixth Circuit, the court below completely rejected the *Larrison* standard even where the key prosecution witness, Ms. Deanna Statler, recanted her testimony. App., *infra*, 43a-44a.

The decision below further conflicts with many other Circuits with respect to the scope of its application. It rejects the prevailing requirement that a new trial be ordered when perjury material to the case is used and the prosecutor should have known of its falsity. As shown below, the perjury here was presented by a member of the prosecution team and the prosecutor plainly should have known that the testimony was false. Yet the court below declared that if "the government did not knowingly present the false testimony," then it would not be held to the traditional *Larrison* standard. App., *infra*, 10a. The court thereby shifts to defendants the unjustified burden of proving actual knowledge rather than recklessness or negligence by the prosecutor in utilizing perjury. The courts below even denied defendants' motions for an opportunity to satisfy this new standard. This new permissiveness towards perjury amid prosecutorial negligence conflicts directly with the Ninth Circuit, which adheres to the *Larrison* test where the prosecution negligently allowed the introduction of perjured testimony. *See United States v. Krasny*, 607 F.2d 840, 844-45 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); *United States v. Chisum*, 436 F.2d 645 (9th Cir. 1971).

In the case at bar, the perjury was by a prominent member of the prosecution team. Ms. Statler testified falsely about data she discussed with the prosecutor AUSA Patrick Hansen. He told her what he wanted from the data and he supplied her with a sample spreadsheet. C.A. App. 15. Using his spreadsheet, she entered one or two of the files and then showed it to prosecutor Hansen to ask if that was what he was looking for. *Id.* at 15-16. Ms. Statler met with the prosecution team in order to prepare the false trial exhibit (20B), *id.* at 20-21, and then commit perjury. This was perjury by a member of the prosecutorial team, triggering the traditional *Larrison* test even in Circuits that have departed from it in other situations.

The prosecutor AUSA Patrick Hansen personally prepared the false trial exhibit 20B that graphically illustrated defendants to have engaged in fraud. App., *infra*, 51a; C.A. App. 95 (quoted in *Statement of the Case*, *supra*). Ms. Statler further confirmed prosecutor Hansen "had done the chart on his computer." *Id.* at 114. It was the data presented in Exhibit 20B, including the assertion of 1,178 undocumented claims, that the trial judge later found to be dramatically false. App., *infra*, 43a-45a.

Ms. Statler's post-trial testimony indicated that she played an active and integral role as member of the prosecution team and that she discussed her testimony with AUSA Hansen. C.A. App. 15 ("I discussed the spreadsheet with Mr. Hansen. And also discussed it with other members of—other investigators."). Ms. Statler further testified that she was on loan to the prosecution team itself and took directions directly from prosecutor Hansen. *Id.* at 74-75; Record, Tr. July 10, 2002, pp. 380, 398-99, 2314-15.

As a member of the prosecution team who took instructions from the prosecutor, Ms. Statler's knowledge is plainly imputed to the prosecution. Her perjury was the prosecution's perjury, and it undermines integrity to allow the perjury-based convictions to be sustained. *See United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) ("The phrases—'reasonable likelihood' 'could have affected'—'mandate a virtual automatic reversal of a criminal conviction.'"); *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (prosecutorial knowledge of perjury requires "a virtual automatic reversal of a criminal conviction").

This colorable claim that the government knowingly used perjury to convict defendants would have also prompted a new trial in the First Circuit. The First Circuit held that a colorable claim of government knowledge requires it to "ask whether there is any reasonable likelihood or probability that

the proffered evidence that [a witness's] testimony was false could have affected the jury's judgment." *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir. 2001). The decision below directly conflicts with that "could have" standard.

The overturning of the 75-year-old *Larrison* provides this Court with its best opportunity to resolve the conflict among the Circuits and clarify the standard against perjury. The court below diluted the deterrent against use of perjury in prosecutions. Accident of location should not dictate the fate of a defendant ambushed by perjury. Full review here is necessary to restore consistency and integrity concerning prosecutorial use of perjury.

B. The Decision Below Conflicts in Principle with Rulings of This Court.

Two weeks after the decision below was rendered, this Court rejected permissiveness of prosecutorial deception in an analogous situation. *Banks v. Dretke*, 124 S. Ct. 1256 (2004). There the defendants suffered from the concealment of exculpatory *Brady* material and perjured testimony by government witnesses, and sought relief on that basis. The Court reiterated its holding in *Kyles v. Whitley* that "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 1276 (quoting *Kyles*, 514 U.S. 419, 435 (1995)). "'A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.'" 124 S. Ct. at 1276 (quoting *Kyles*, 514 U.S. at 434-435).

The decision below directly conflicts with this Court's standard. Ms. Statler's truthful testimony would have been that an audit of defendants' records did not indicate any

scheme to defraud. Instead, she presented false inculpatory evidence in order to prove a scheme to defraud and fraudulent intent. Her testimony plainly cast the whole case in "a different light" and under *Banks* and *Kyles* the burden of proof does not shift to defendants to "demonstrate" that otherwise "there would not have been enough left to convict." *Id.* Yet that is precisely what the court below required in permitting prosecutorial perjury unless defendants can prove that the jury would have acquitted them.

When other transgressions occur at trial, this Court does not shift the burden to defendants to prove innocence. *See, e.g., Fahy v. Connecticut*, 375 U.S. 85 (1963). The constitutional standard for erroneous admission of evidence, for example, does not require defendants to show they probably would have been acquitted in its absence. "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of **might have** contributed to the conviction." *Id.* at 86-87 (emphasis added). The test promulgated by the appellate court below to allow perjury conflicts with this Court's high standard for integrity in prosecutions.

Similarly, the decision below conflicts with this Court's holding in *Mesarosh v. United States*, 352 U.S. 1 (1956). There this Court considered convictions for conspiracy under the Smith Act. A key government witness had apparently testified untruthfully in a similar way in analogous proceedings. This Court declared that the witness' "credibility (had) been wholly discredited." *Id.* at 9. This Court concluded that it would be "unreasonable" to find that "the witness . . . . testified truthfully in this case in 1953 as an undercover informer concerning the activities of the Communist conspiracy, yet concurrently appeared in the same role in another tribunal and testified falsely . . . about a plan by

different members of the Communist conspiracy to assassinate a United States Senator." *Id.* at 13 (footnote omitted).

A majority of this Court in *Mesarosh* thought a new trial was required due to this perjury, even though it did not even occur in the same proceeding. This Court has reiterated that high standard against perjury in similar cases. "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited . . . ." *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956). Where, as here, the credibility of a key government witness has been "wholly discredited," a new trial is warranted. The court below contravened this Court's precedents in holding otherwise.

This Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added, citations omitted). That knowledge is imputed to prosecutors where, as here, the falsity of the testimony is known by a member of the prosecution team. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437.

The Seventh Circuit below violated these principles in limiting a new trial to where the prosecutor was shown to have actually known about the perjury. App., *infra*, 9a ("absent a finding that the government knowingly sponsored the false testimony"). This Court has rejected a standard of actual knowledge in the analogous context of favorable evidence. "But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose

is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Where, as here, the deception is by a member of the prosecutorial team, it is "inescapable" that a new trial is warranted. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" and "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor") (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

This Court has never required defendants victimized by perjury to prove that they would have been otherwise acquitted in order to win a new trial. The decision below conflicts in principle with this Court's holdings.

II. THE UNCERTAINTY CONCERNING THE PROPER STANDARD FOR DETERRING PROSECUTORIAL USE OF PERJURY HAS EXACERBATED ITS USE, HEIGHTENING THE IMPORTANCE OF THIS ISSUE.

The uncertainty over the standard for a new trial due to perjury adds fuel to the fire of dishonesty. Highly publicized cases are increasingly plagued and tainted by perjury in the prosecution. In the Southern District of New York, subject to the relatively tolerant view of perjury by the Second Circuit, the high-profile conviction of Martha Stewart was followed by news that a key government witness committed perjury at trial. Public confidence in the integrity of prosecutions is lost. Lisa Stein, "The Big Lie(s)," *U.S. News & World Report* 18 (May 31, 2004) ("In a dramatic twist in the Martha Stewart case, federal prosecutors last week charged a government witness with lying on the stand. . . . Shares of Martha Stewart Living Omnimedia soared as high as 20

percent on Friday after news of the perjury charges broke. Now here's a thought: Maybe one of these days we'll discover the truth.").

Appellate courts are besieged with convictions procured by perjury, yet have only conflicting standards to apply. The First Circuit has encountered perjury by prosecution in at least three different cases in the past five years. *See United States v. Gonzales-Gonzales*, 258 F.3d 16 (1st Cir. 2001); *United States v. Josleyn*, 206 F.3d 144 (1st Cir. 2000); *United States v. Huddleston*, 194 F.3d 214 (1st Cir. 1999). Its relative tolerance of prosecutorial perjury may have increased the occurrence there.

Amid the uncertainty in the proper standard, perjury runs amok. The Fourth Circuit has faced an epidemic of perjury in prosecutions challenged on appeal, including at least five appellate cases in the last five years on this issue. *See United States v. Maynard*, 77 Fed. Appx. 183 (4th Cir. 2003); *United States v. King*, 71 Fed. Appx. 192 (4th Cir. 2003); *United States v. Gullett*, 62 Fed. Appx. 554 (4th Cir.), *cert. denied*, 124 S. Ct. 498 (2003); *United States v. Roberts*, 262 F.3d 286 (4th Cir. 2001), *cert. denied*, 535 U.S. 991 (2002); *United States v. McGrady*, 1999 U.S. App. LEXIS 2395 (4th Cir.), *cert. denied*, 528 U.S. 855 (1999). In *King*, the perjury was so overwhelming that "in thirty years of practice and ten on the bench, [the trial judge] had never had 'less confidence' in a verdict." 71 Fed. Appx. at 194. The Fourth Circuit's response has been adherence to the traditionally disciplined standard rejected by the court below.

Had defendants been convicted in most other Circuits—or even in their own Seventh Circuit earlier—then they would have obtained a new trial. Defendants' incarceration and deprivation of a new trial is purely a product of happenstance of venue. This lottery effect of the conflict in the Circuits is confounding judges, corroding historic deterrence of perjury, undermining the integrity of prosecutions, and eroding public

confidence in justice. *See* Brian Murray and Joseph C. Rosa, "He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness," 27 *N.E. J. on Crim. & Civ. Con.* 1 (Winter 2001).

The permissive approach towards perjury grows like a cancer amid the confusion about the proper standard. The Fifth Circuit struggled with the uncertainty to conclude only that it "arguably" adheres to the same probability standard for evidence of perjury as with other newly-discovered post-trial evidence. *United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989). Fifteen years later, the standard is even murkier. In the absence of a clear standard as a bulwark against the use of perjury by prosecutions, false testimony will spread further.

The medley of standards governing prosecutorial perjury stands in stark contrast to the exclusionary rule, which flatly prohibits the use at trial of much evidence improperly seized. *See Weeks v. United States*, 232 U.S. 383, 392 (1914). The deterrent effect of the exclusionary rule is woefully lacking with respect to perjury in prosecutions. The decision below allows prosecutors to close their eyes to blatant perjury by key government witnesses. But reward should not greet negligent conduct. The Seventh Circuit is in error in condoning such negligence here despite its possible effect on the outcome, in contrast to the other Circuits and holdings of this Court. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 272 (1959) (reversing a conviction obtained by perjury because it "may have had an effect on the outcome of the trial").

Integrity in prosecutions has eroded amid the uncertainty about the standard governing post-trial discovery of perjury. The traditional *Larrison* standard served the judiciary and public well in protecting defendants' right to a new trial and deterring perjury, but the newly permissive standard adopted below eliminates that safeguard. There is heightened importance to reestablishing a clear and effective deterrent to the use of perjury by the prosecution.

III. THE DECISION BELOW ERRS IN DEPRIVING DEFENDANTS OF DUE PROCESS AND RIGHT TO TRIAL BY JURY BY AFFIRMING CONVICTIONS ON COUNTS THAT EXPRESSLY ADOPTED AND WERE INTERTWINED WITH OTHER COUNTS NECESSARILY DISMISSED FOR TAINT OF PERJURY.

The trial court necessarily dismissed most of the convictions against defendants due to the perjured testimony, yet sustained counts 12 and 14. But the jurors almost certainly reached these remaining counts after they mistakenly convicted defendants on the primary counts. A greater prejudicial effect is difficult to imagine. Had the prosecutor falsely declared defendants to have been convicted felons in his closing statement, which would obviously require a mistrial, the prejudice would not have been as great. It is a violation of due process and the right to a fair trial to prejudice the jury by falsely obtaining convictions on the major charges (counts 1, 2, 3, 4, 5, 6, 9, 10, 11 and 15 for defendant Mitrione and counts 1, 3, 4, 5, 9, 10, 11 and 15 for defendant DeVore, App., *infra*, 48a), while allowing the convictions on later, relatively minor counts to stand. Over 83% of the convicted counts for defendant Mitrione were falsely obtained, and 80% for defendant DeVore, thereby tainting the remaining convictions and requiring their vacatur.

A. The Decision Below Deprived Defendants of Due Process By Affirming Convictions that Expressly Incorporated Counts Necessarily Dismissed.

It is well-established that a conviction must be reversed when it is based on alternative legal theories, one of which is legally erroneous, and it is not possible to know the basis of the jury's decision. *See, e.g., United States v. Sawyer*, 85 F.3d 713, 730-31 (1st Cir. 1996) ("When a jury has been

presented with several bases for conviction, one of which is legally erroneous, and it is impossible to tell which ground the jury convicted upon, the conviction cannot stand."); *cf. Peters v. Kiff*, 407 U.S. 493, 504 (1972) (reversing a conviction where "there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case"). This unconstitutional infirmity is presented here: the only remaining counts expressly incorporate and are intertwined with counts 1 and 2, upon which the jury convicted defendants due to false testimony. The trial judge found that counts 1 and 2 cannot be sustained. Nor can other counts utilizing them be sustained either. *See Williams v. United States*, 500 F.2d 105, 108 (9th Cir. 1974) (reversing a perjury-based conviction because "[a] conviction based substantially upon tainted evidence cannot stand").

The appellate court below expressly found that the convicted counts incorporated the vacated counts:

> Here, the defendants were convicted of one count of mail fraud and one count of filing false claims. **These counts adopted parts of counts 1 and 2**, which charged the defendants with devising a scheme to defraud the Medicaid and Medicare programs of the State of Illinois and the United States.

App., *infra*, 16a (emphasis added). The appellate court even relied on this incorporation in affirming a longer sentence for defendants. *Id.* at 16a-17a. Yet the vacating of counts 1 and 2 shows that the government did not prove beyond a reasonable doubt its charges in counts 12 and 14, in violation of the Due Process Clause. *See In re Winship*, 397 U.S. 358 (1970); *see also Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Defendants have a right to acquittal if there is reasonable doubt on any element of a criminal charge, and the Due Process Clause protects against infringements on this right. U.S. CONST., AMEND. V. Where, as here, a key government

witness lies about the basic fact in the case (scheme to defraud), and most of the charges are necessarily dismissed for that reason, the jury might have acquitted defendants due to the actual untruthfulness of this key government witness. *See Napue v. Illinois*, 360 U.S. at 269 (holding that a "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence").

Convictions on counts 1 and 2 were improperly obtained and thereby vacated, and the fruits of those counts—the remaining convictions on counts 12 and 14—must be vacated as a result. It is well-established that evidence obtained as fruit of improperly seized evidence—the so-called poisonous tree—is inadmissible in court. *See, e.g.*, *Taylor v. Alabama*, 457 U.S. 687 (1982); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). The same logic must also prevail with respect to convictions obtained based on improperly obtained convictions. A corrupt foundation can no longer support the claims built upon it; dismissal of the scheme to defraud (counts 1, 2 and 15) cannot leave standing counts (12 and 14) relying on the dismissed scheme.

The due process violations also spilled over into sentencing. The district court enhanced defendants' sentence to 23 and 15 months based on a mere $75.25 in convicted charges only by relying on alleged "ghost billing" fraud that was later disproven. The district court had already found that "ghost billing" for services never provided did not occur any more frequently than a failure to bill for services that were provided. App., *infra*, 45a. The draconian sentences were plain error and this issue was duly preserved on appeal below.

B. The Decision Below Deprived Defendants of Their Right to Trial by Jury by Substituting the Court's Factfinding for the Jury's.

The decision below violated defendants' constitutional right to a jury trial without being falsely labeled as convicted felons or having their jury be falsely led to that conclusion. *See Turnbill v. Bordenkircher*, 634 F.2d 336 (6th Cir. 1980) (ordering a new trial due to prejudice from a jury perception of a felony conviction, even where there is no defense objection). Defendants are entitled to an untainted jury determination of their guilt or innocence, regardless of the trial judge's own opinion.

Where, as here, the perjury concerns a material element of the alleged crime, a judge or appellate court is usurping the role of the jury by denying a new trial. Here the perjury by the government witness denied defendants their right to an impartial determination by the jury of their alleged criminal intent. *See United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of **all the elements** of the crime with which he is charged.") (emphasis added). This Court held in *Agurs* that a conviction must be overturned because of the government's knowing use of perjured testimony if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. *See also Chambers v. Mississippi*, 410 U.S. 284 (1973) (defendant is denied a fair trial when certain hearsay is excluded or a state's rule against impeaching a witness prevents defendant's using a prior confession).

Defendants have a constitutional right to trial by an impartial jury, regardless of whether the trial judge and appellate court may somehow think they are guilty. That right to a fair jury trial was taken away from defendants by the decision below, in violation of the Sixth Amendment. U.S. CONST., AMEND. VI.

The mail fraud count requires a jury finding of specific intent to defraud, beyond reasonable doubt, and the false claims count requires similar scienter. The Statler testimony was the primary evidence of *mens rea*, and was found by the court to be utterly false. Defendants have a right to a trial by an impartial jury, free from taint of perjury, on these counts. The remaining evidence on the mere $75.25 is more consistent with mistake than fraud, and thus cannot establish guilt as a matter of law beyond a reasonable doubt. *See United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971); *see also Illinois Physicians Union v. Miller*, 675 F.2d 151, 152 (7th Cir. 1982) (requiring an adequate sample size for allegations of inappropriate billing in audits). The taint from the perjury on the issue of intent requires a new trial by jury even if the remaining evidence supported conviction. *See United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996).

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND DEPRIVES DEFENDANTS OF DUE PROCESS BY CONVICTING FOR CONDUCT THAT COMPLIED WITH A FEDERAL REGULATION BUT CONTRAVENED A STATE HANDBOOK.

Defendants complied with the applicable federal regulation and yet are imprisoned for violating a contrary, informal state handbook. This is a violation of due process and creates enormous uncertainty about overlapping federal and state regulations. The gravamen of the convictions are that defendants billed for a therapist, Walter Woods, who allegedly had insufficient credentials under state Medicaid policies. Defendants did not make expressly false representations in utilizing him, and their convictions cannot rest on a state policy in conflict with federal regulations.

Federal regulations allow physicians to use discretion in determining whether assistants are qualified to treat patients:

> We deliberately used the term any individual so that the physician (or other practitioner), **under his or her discretion and license**, may use the service of **anyone** ranging from another physician to a medical assistant. In addition, it is impossible to exhaustively list all incident to services and those specific auxiliary personnel who may perform each service.

66 F.R. 55246, 55268 (Nov. 1, 2001) (emphasis added). The use of the assistant is permissible under state law governing medical practice, independent of any billing issue. *See id.* Medicare mandates reimbursement where, as here, the physician in his discretion used this assistant. Under federal law, Dr. Mitrione, not a judge or jury, determines what credentials are adequate for assistants like his therapist Walter Woods. *See* 42 C.F.R. § 410.26 (funding services furnished by auxiliary personnel "incident to" a physician's services).

A. The Decision Below Errs in Failing to Apply the Supremacy Clause to Conflicting Federal and State Regulations in Medicare.

The courts below turned federal preemption on its head by affirming defendants' convictions for complying with federal regulations rather than a state handbook. An Illinois handbook simply declared, by fiat, that "'[t]he provision of psychiatric services is limited . . . and must be *personally* provided by the physician who submits charges. Services provided by a psychologist, social worker, etc. are not reimbursable.'" App., *infra*, 3a (emphasis in original). But federal regulations override informal state handbooks, and federal prosecutions cannot rely on conduct complying with federal law but violating a conflicting state handbook. U.S. CONST., Art. VI, cl. 2.

"Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The decision below gave an informal state handbook more weight than a formally promulgated federal regulation. The court then affirmed the convictions based on the handbook despite state case law already denying its enforcement for failure to be promulgated pursuant to the Administrative Procedure Act. *See Sheen v. Illinois Dep't of Public Aid*, Case No. 86-MR-30 (Ill. 10th Cir. Dec. 4, 1987) (reprinted at C.A. App. 29).

In addition to contravening *Christensen*, the ruling below is inconsistent with many lower court decisions. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 882 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 2641 (2003) (Easterbrook, J., concurring) ("If the agency abjures the APA's procedures for making decisions, courts owe the administrative interpretation careful attention, **but nothing more**.") (citation omitted, emphasis added); *United States v. Ward*, 2001 U.S. Dist. LEXIS 15897 (E.D. Pa. Sept. 5, 2001) (dismissing an indictment because "courts should not defer to an agency's informal interpretation of an ambiguous statute or regulation in a criminal case") (citing appellate precedents).

Nor is there the requisite false representation to support the remaining counts. *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999) (holding that a 'scheme to defraud' under the wire and mail fraud statutes must include the element of a material falsehood); *United States ex. rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001) ("[A] claim under the [False Claims] Act is legally false only where a party [falsely] certifies compliance with a statute or regulation as a condition to governmental payment."); *United States v. Gee*, 226 F.3d 885, 891 (7th Cir. 2000). It was reversible error for the courts

below to hold that defendants' compliance with federal law "would go to the Defendants' intent and be relevant. This argument is not a basis for dismissing or striking parts of the indictment, however." App., *infra*, 21a. Compliance with federal law does require striking counts 12 and 14 here.

Even if Illinois were allowed to narrow its reimbursement obligations under Medicaid—which is doubtful as explained below—defendants' reliance on federal law was reasonable. "Here, 'competing interpretations of the applicable law [are] far too reasonable to justify these convictions.'" *United States v. Whiteside*, 285 F.3d 1345 (11th Cir. 2002) (quoting *United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985)) (reversing a Medicare fraud conviction). The court below conflicted with these circuits in holding otherwise.

The Third Circuit invalidated a Pennsylvania restriction on Medicaid reimbursement due to federal preemption. *See Pennsylvania Med. Soc'y v. Snider*, 29 F.3d 886, 891-92 (3d Cir. 1994). The California Supreme Court invalidated a Medicaid state statute in favor of the federal interpretation, despite ambiguity in the federal rule. *Olszewski v. Scripps Health*, 30 Cal. 4th 798 (2003). "[O]ur finding of preemption comports with decisions reached by other jurisdictions." *Id.* at 824 (citing, *inter alia*, *Public Health Trust of Dade Co. v. Dade Co. School Bd.*, 693 So. 2d 562, 567 (Fla. Dist. Ct. App. 1997)). California law had previously permitted a Medicaid (Medi-Cal) caregiver to collect on a bill by imposing a lien against a personal injury recovery by the patient from a third party, but federal regulations preempted that law.

This Court consistently invalidates state regulations that crimp on federal mandates. In *Philpott v. Essex County Welfare Board*, this Court held that a federal mandate bars a state from attempting to attach Social Security benefits as reimbursement for state welfare assistance payments. 409 U.S. 413 (1973). In *Rose v. Arkansas State Police*, this Court

emphasized that "[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." 479 U.S. 1, 3 (1986) (*per curiam*); *see also id.* at 4 (invalidating a state law limiting state benefits in conflict with the federal mandate, because it "is repugnant to the Supremacy Clause"). The Sixth Circuit enjoined Ohio's practice of reducing benefits for families with dependent children because it conflicts with regulations promulgated under the Social Security Act, 42 U.S.C. § 401 *et seq.* *See Snider v. Creasy*, 728 F.2d 369 (6th Cir. 1984); *see also Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (*per curiam*) (holding that where there is "a 'conflict' under the Supremacy Clause ... the State cannot win").

The decision below splits with other Circuits in holding that defendants' compliance with federal law was criminal. App., *infra*, 13a (citing 160 F. Supp. 2d 993). There is not guilt beyond a reasonable doubt where, as here, defendant's statement is a reasonable construction of the law. *See United States v. Johnson*, 937 F.2d 392, 399 (8th Cir. 1991); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978). Criminal prosecutions are not the place for "pioneering interpretations." *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979) (*en banc*).

B. Review Here is Necessary to Resolve Widespread Uncertainty and Conflicts for Prosecutions that Exploit Ambiguities in Medicare Regulations.

Where, as here, the criminal conviction relies on a vague, ambiguous, or conflicting legal requirement, it cannot stand. As this Court emphasized in *United States v. Harriss*:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated

> conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

347 U.S. 612, 617 (1954) (citations omitted). *See also Dowling v. United States*, 473 U.S. 207, 229 (1985) (reversing a conviction because "Congress has not spoken with the requisite clarity," and affirming the "'time-honored interpretive guideline' that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985) and *United States v. Hudson*, 11 U.S. 32 (1812), inner quotations omitted).

The decision below conflicts with many Circuits. *See United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987) ("In the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them."); *see also United States v. Apex Oil Co., Inc.*, 132 F.3d 1287 (9th Cir. 1997) (affirming dismissal of indictment because the conduct was not clearly forbidden by the regulations); *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993), *cert. denied*, 512 U.S. 1245 (1994) (in criminal cases, "a court will not be persuaded by cases urging broad interpretation of a regulation in the civil-penalty context").

The Medicaid program has been recognized to constitute one of the most complex and intractable regulatory systems in our country. *See Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, J., dissenting) (observing that "the Medicaid program is a morass of bureaucratic complexity"); *United States v. Harris*, 942 F.2d 1125, 1132 (7th Cir. 1991) ("If the obligation . . . is sufficiently in doubt, willfulness is impos-

sible as a matter of law, and the 'defendant's actual intent is irrelevant.'") (citing *Garber*, 607 F.2d at 98, quoting *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974)). Other courts have dismissed the type of fraud charge against physicians pressed here. *See, e.g., State v. Vainio*, 306 Mont. 439 (2001) (reversing a Medicaid conviction because it relied on an improperly promulgated state regulation); *Siddiqi v. United States*, 98 F.3d 1427, 1429 (2d Cir. 1996) (reversing Medicare fraud convictions for "claim[s] for services rendered by somebody else"); *id.* at 1438 ("It takes no great flash of genius to conclude that something is wrong somewhere."). Misfortune of venue should not result in imprisonment for charges properly dismissed elsewhere.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 16, 2004

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

September 22, 2003, Argued
February 9, 2004, Decided

Before ROVNER, EVANS, and WILLIAMS, *Circuit Judges*.

OPINION

EVANS, *Circuit Judge*. Dr. Robert T. Mitrione, a psychiatrist, and Marla A. DeVore, his office manager, were indicted on charges of Medicaid and Medicare fraud. The alleged fraud involved billing for services that were not provided (ghost billing), overstating what services were provided (upcoding), and billing for services provided by others but declaring that Dr. Mitrione provided the service (substitute billing). The bulky indictment charged Mitrione and DeVore with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, eight counts of mail fraud, in violation of 18 U.S.C. § 1341, five counts of filing false claims, in violation of 18 U.S.C. § 287, and one count of health care fraud, in violation of 18 U.S.C. §§ 1347 and 2. After one of the mail fraud counts was dismissed, a jury, after

a 3-week trial, convicted Mitrione of everything except two of the counts and DeVore on 10 of the 14 counts against her. After the verdict, the defendants filed a motion for new trial based on newly discovered evidence claiming that a government witness committed perjury during the trial. The district court judge found that perjury indeed occurred and that it affected all of the defendants' counts of conviction except the two that only involved substitute billing. A new trial was ordered for all but these two counts, but the government decided not to retry the case. Mitrione was sentenced to a term of 23 months and DeVore to 15 months. Restitution for each was set at $11,255.65. Mitrione and DeVore appeal, raising a number of issues, but we will mention only those that have arguable merit. Before getting to that, we begin with the facts, with an emphasis on the "substitute billing" charges. And the facts, as they must be at this stage of the case, are presented in the light most favorable to the verdict.

Dr. Mitrione established a psychiatric practice in Springfield, Illinois, in the early 1990's. With his wife, Cecelia, who was his assistant at the time, he learned the billing aspect of the business. In 1991, Mitrione applied to become a Medicaid provider with the Illinois Department of Public Aid (IDPA), the agency that administers the program in Illinois. Both Mitriones received IDPA billing training, which included the handling of forms and CPT[1] codes. Dr. Mitrione also received an IDPA provider manual for physicians and signed an IDPA agreement which included specific requirements for billing Medicaid. He agreed to comply with all current and future policy provisions as set forth in the applicable medical assistance handbooks. At the time, one policy provided that physicians could not be paid under Illinois Medicaid for

[1] CPT refers to "Current Procedural Terminology." CPTs are listed in a book of codes used for medical billing which is published by the American Medical Association.

psychiatric services provided by employees under their supervision. The handbook for physicians provided:

> The provision of psychiatric services is limited . . . and must be *personally* provided by the physician who submits charges. Services provided by a psychologist, social worker, etc. are not reimbursable.

Mitrione also enrolled as a provider with the Medicare Part B system, which, like Medicaid, is a "fee for service" program. Under certain circumstances, Medicare (unlike Illinois Medicaid) allows providers to delegate certain psychological services to others in their employ. Medicare regulations require those services to be (1) medically necessary; (2) an integral yet incidental part of a physician's professional service; (3) commonly provided in a physician's office; (4) either rendered without charge or included in the physician's bill; (5) representative of an expense incurred by the physician or nonphysician in his or her professional practice; (6) performed under the direct supervision of the physician, nonphysician, or physician-directed center; and (7) initiated or managed by the employing physician.

The Medicare manual states that to fulfill the "direct supervision" requirement, a physician—not a proxy—must be present in the same office so he can intervene in case an emergency arises. The Medicare rules did not allow payment for the services of unlicensed mental health providers, even if a physician was in the area when the service was provided.

In 1992, Mitrione expanded his practice to include patient care at the Mental Health Center of Central Illinois (MHC), a state-funded, nonprofit mental health clinic in Springfield. Mental health clinics funded by the State of Illinois differ from private physician practices. Specifically, these clinics are permitted to bill Medicaid for nonphysician services.

In September 1994, the Mitriones fell behind in their billing. It was at that time that Mitrione brought Marla DeVore, a counselor whom he met at MHC, into his practice as a new office manager. He also moved his office to another site and renamed it Mitrione and Associates (M&A). Mitrione and DeVore apparently got along well—they were married in 2001 (Mitrione and Cecelia were divorced in 1997) after the indictment in this case was returned.

When she came on board, DeVore recruited Shari McGowan, a nurse at the MHC, to help her set up a billing system. DeVore taught McGowan how to enter billing information on M&A's computer.

DeVore and Mitrione designed a "superbill" which contained the five codes primarily used in the practice. Typically, the doctor or a therapist who provided the service placed his name on the superbill and added a checkmark next to the code to indicate the service provided. The superbills, therefore, provided essential information that M&A employees used to prepare claim forms. The evidence at trial disclosed that soon after Mitrione and DeVore became aware of official inquiries into their billing practices, they ordered the destruction of several years worth of superbills.

Mitrione and DeVore instituted a policy to bill IDPA for the services of nonphysicians and caused their billing clerks to substitute Mitrione's name for that of a nonphysician on the claim forms sent to IDPA. To do this, the clerks changed the name of the service provider when manually filling out the IDPA billing forms.

DeVore reviewed the claims before they were sent to Medicare, IDPA, or various insurance companies. She also reviewed rejected claims and instructed McGowan how to rebill. If McGowan had a problem with a CPT code or with a billing issue that DeVore could not resolve, she asked Mitrione what to do.

In 1995, Mitrione hired a few nonphysicians to provide services to M&A's clientele. For example, he hired a social worker, Dana Ingram, and counselors Ron Havens and Cathy Walters. When those employees quit, he hired Terry Kuethe Goff, an unlicensed intern who was working to complete requirements for an advanced psychology degree, and Walter Woods, a drug and alcohol counselor.

Woods had been a director of Gibralter, Ltd., a failing drug and alcohol rehabilitation center in Springfield. Certain drug and alcohol centers qualify for a special certification from the State of Illinois similar to the provision for mental health facilities. Through this certification, a center may submit billings for nonphysician counselors working under the supervision of a physician. During this time, however, there was a moratorium that precluded additional drug and alcohol certifications of this type in Sangamon County, where Springfield is located.

Over the next several months, Mitrione, DeVore, and Woods made several unsuccessful attempts to secure the drug and alcohol counseling licenses and billing privileges that belonged to Gibralter and to obtain similar licenses and billing privileges for their own practice. The Gibralter Medicaid certificate was ultimately terminated, and M&A was unable to obtain authority to bill Medicaid for nonphysician drug and alcohol services.

Since Woods held only an alcohol and drug counseling certificate, he was not licensed to provide mental health services. Both defendants knew they could not bill Medicaid for Woods' services. Nevertheless, shortly after the Gibralter transfer was denied, Woods' role was expanded by assigning him Medicaid clients. Mitrione and DeVore directed him to counsel patients with diagnoses other than drug and alcohol addition. Goff objected to both Mitrione and DeVore, saying that Woods was acting beyond his certification. Mitrione and

Devore also assigned Goff a full caseload of Medicaid and Medicare clients, despite her lack of license and private clinical experience.

The essence of the substitute billing charges was that Mitrione and DeVore assigned Medicaid and Medicare patients to counselors and therapists for treatment and then billed as though Mitrione either provided the service himself or directly supervised the service.

Shortly after she joined M&A, DeVore asked Sheryl Walters, a billing employee with MHC, how M&A could bill Medicaid for counselors' or therapists' services. Walters explained that M&A could not bill for those services because it was not a licensed not-for-profit mental health clinic. Shortly thereafter, Walters told Mitrione the same thing when he inquired about billing for therapists. During an advanced IDPA seminar, which Mitrione attended in October 1996, it was confirmed that Medicaid would not pay for psychiatric services performed by non-physicians.

In the spring of 1996, M&A formed a therapy group for the survivors of sexual abuse (SOSA). The group was made up of women who survived sexual trauma, molestation, or rape in their childhood. Neither DeVore nor Goff, who initially ran the group, were licensed to practice in this area.

The first SOSA group meeting was held in May 1996. Because of the abuse suffered by members of the group, they were often fragile and volatile and, as a result, discussions during the sessions were at times personal and painful. According to a psychiatric expert, if not handled carefully, the group members could have been hurt further.

Shortly after the program started, DeVore and Mitrione assigned Woods to co-facilitate the SOSA group sessions with Goff. When Goff objected that Woods was unqualified to co-lead the group, they reminded her that she was a "supervisee," that is, an intern who needed Mitrione's supervision

for her advanced degree and eventual license. Goff nevertheless complained weekly to Mitrione that Woods' actions and demeanor in the group were inappropriate.

Woods, too, told both DeVore and Mitrione that certain therapy sessions were beyond his training levels, though he continued with them. He was even assigned to do individual therapy with some members of the group. He also handled several group sessions by himself. The defendants then billed as if Mitrione had provided the service. Some of these billings for Woods were signed and submitted by DeVore.

In addition to billing IDPA, Mitrione and DeVore billed Medicare for Woods' work with the SOSA group and counseling of clients. Medicare would not have paid for the service if it knew that the group was being run by a drug and alcohol counselor with no other licensing, certification, or education. Even if Goff had been in the group with Woods, Medicare would not have paid because Goff was not licensed and Mitrione was not present in the office and available to intervene if an emergency arose.

Unlike their defense to the ghost billing and upcoding charges—that they were simply inept billers—the defendants defended the substitute billing charges by claiming ignorance of the rules. Mitrione claimed that he did not receive the physicians handbook, or that he tossed it away without reading it. DeVore, on the other hand, claimed that she was unaware the handbook existed. In addition, both Mitrione and DeVore claimed that Gary Vaughn (who died before the trial), an IDPA representative, told them that the substitute billing practice was acceptable.

The evidence, however, demonstrated that Mitrione received the physicians handbook (which contained the billing prohibition) at least three times: (1) when he first enrolled as a provider; (2) when he was trained; and (3) when he attended

an IDPA seminar in October 1996. Additionally, Mitrione pointed to the manual in his office when interviewed by investigators.

Moreover, neither defendant mentioned to the investigators that Vaughn had sanctioned their substitute billing practices. In December 1999, Mitrione phoned the IDPA Office of Inspector General to inquire about the investigation and to try to convince investigators that any billing issues were the work of a former employee. Mitrione never suggested at that time that Vaughn sanctioned the improper billing methods that were used. Nor could Mitrione explain why the issue even came up with Vaughn, since DeVore and he claimed that they did not know about the prohibition against billing for nonphysician services.

We turn now to the defendants' claim that the perjury at trial tainted their convictions on the substitute billing counts. During the rebuttal phase of the trial, the government offered the testimony of Deanna Statler, an IDPA auditor. She presented a summary which included information about the frequency of ghost billing and upcoding. Mitrione (DeVore, unless otherwise noted, joins all of these arguments, and our references from now on to "Mitrione" apply to both defendants), in defense, claimed that the ghost billing and upcoding were just mistakes, but Statler testified that these "mistakes" were almost always in the defendants' favor. The implication of this testimony was that the defendants were lying because if they had just been mistaken, there would have been as many mistakes against their interests as there were in their favor.

Statler's testimony, however, was not the truth, the whole truth, and nothing but the truth. She claimed she counted certain things herself when doing her audit, but she actually had others do much of it for her. She said she excluded some numbers from her calculations but hadn't, which made the numbers look worse for the defendants than they really were.

This perjury, reasoned Judge Scott in the district court, entitled the defendants to a new trial on most, but not all the counts upon which they were convicted. We review the decision to deny the new trial motion on two of these counts for an abuse of discretion. *United States v. Westmoreland*, 240 F.3d 618, 637 (7th Cir. 2001).

In determining whether a new trial is warranted when a witness presented by the government has lied, we have traditionally used a test adopted 75 years ago in *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). Under the *Larrison* test, new trials are granted when (1) the witness is material and the testimony false; (2) the jury *might* have reached a different verdict if it knew the testimony was false or if it hadn't heard the testimony; and (3) the defense was taken by surprise by the false testimony or didn't learn of its falsity until after trial.

This old test puts our circuit at odds with other circuits which, absent a finding that the government knowingly sponsored the false testimony, require a defendant seeking a new trial to show that the jury would *probably* have reached a different verdict had the perjury not occurred. *See, e.g., United States v. Williams*, 344 U.S. App. D.C. 64, 233 F.3d 592 (D.C. Cir. 2000); *United States v. Huddleston*, 194 F.3d 214, 217-21 (1st Cir. 1999); *United States v. Provost*, 969 F.2d 617, 622 (8th Cir. 1992); *United States v. Petrillo*, 237 F.3d 119, 123 (2nd Cir. 2000); *United States v. Krasny*, 607 F.2d 840, 844-45 (9th Cir. 1979); *United States v. Sinclair*, 109 F.3d 1527, 1532 (10th Cir. 1997). But see *United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000); *Gordon v. United States*, 178 F.2d 896, 900 (6th Cir. 1949). We even criticized the *Larrison* test a dozen years ago. *See United States v. Mazzanti*, 925 F.2d 1026, 1029 (7th Cir. 1991).

Today, we overrule *Larrison* and adopt the reasonable probability test.[2] In order to win a new trial based on a claim that a government witness committed perjury, assuming as in this case that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons. Defendants will have to show that the existence of the perjured testimony (1) came to their knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) would probably have led to an acquittal had it not been heard by the jury. *See United States v. Gonzalez*, 93 F.3d 311 (7th Cir. 1996).

The defendants argue that Statler's false testimony was material and that it tainted their convictions on the substitute billing counts because it "tipped the scales" against them. However, Statler did not testify about the propriety of substitute billing or the defendants' knowledge that such claims were prohibited. Rather, she testified about the frequency of ghost billing and upcoding. Statler's summary included services rendered by therapists other than Mitrione, but it did not comment on whether those services were reimbursable. So Statler was really not a material witness with respect to the substitute billing counts.

Nevertheless, the defendants claim that Statler's testimony demolished their credibility, and without it the jury might have reached a different verdict. We disagree. For one thing, the evidence against Mitrione and DeVore on all counts, without Statler's testimony, was strong. The government also presented substantial evidence that the defendants knew they were engaging in impermissible substitute billing. Having reviewed this record, we do not believe that the jury would

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[2] Pursuant to *Circuit Rule 40(e)*, this opinion has been circulated among all the judges of this court in regular active service. No judge favored a rehearing en banc on the question of overruling *Larrison v. United States*.

have probably reached a different verdict on the substitute billing counts had Statler's testimony not been presented. And, we add, our review of the record would not lead us to conclude that the jury would have probably reached a result other than guilty on the upcoding and ghost billing counts had it not heard Statler's rebuttal testimony.

We turn next to the defendants' claim that the district court erred in not granting a new trial because the prosecutor referred to the September 11 terrorist attacks in his closing remarks. Closing arguments were supposed to begin on September 11, 2001, but they were delayed a day because of the attacks. On September 12, the prosecutor began his closing argument with this statement:

> Ladies and gentlemen. Good morning. Our job just got harder in the last 24 hours. We're already facing an incredibly difficult task as we've done for the last three and a half weeks trying to sort this out. It's now made more difficult by the events of yesterday, the devastation that terrorism has brought to our country. But that's why we need to do this today. That's why we got out of bed today and came here. The very institutions that these people seek to undermine must continue.

The district court overruled a defense objection to this remark, saying the defendants would also have a chance to comment briefly on the events of the day before. The prosecutor then continued:

> One of those systems is the system of justice. And that's one of our most important systems in the country, and that's something that we've all been a part of the last three and a half weeks. Every one of us. And that's why we need to redouble our efforts today to concentrate, to stay on task, to get back to pay attention to the evidence, no matter how hard it is after yesterday. What we do today is important. It is important certainly to

> Dr. Mitrione and Ms. DeVore. But it's important to the fiscal integrity of the Medicare program and Medicaid program and the medical assistance programs. It is important to our system of justice.

Mitrione's attorney began his closing with the following remarks:

> Now, [the prosecutor] this morning tried to draw some analogy or some connection between the events of yesterday and this case. I think he has lost all sense of proportion and prospective [sic]. And I don't want to minimalize or trivialize the destruction of yesterday by drawing any connection with this case. There's no connection.

DeVore's attorney also commented on the prosecutor's remarks, saying "other counsel have commented there are a lot of things going on in the world right now, but the most important thing in the world going on as far as Marla DeVore is your deliberations and what you think about her conduct."

We consider claims that a prosecutor has tainted a trial with improper remarks under a two-step inquiry. *See United States v. Renteria*, 106 F.3d 765, 766 (7th Cir. 1997). We first consider the remarks in isolation. If they are improper in the abstract, we then consider them in the context of the entire record and ask whether they denied the defendant a fair trial. Only if the remarks undermined the fairness of the proceedings will we overturn a conviction.

There is nothing in the remarks by the prosecutor here that would warrant a move to the second step of our inquiry. Even viewed in isolation, the prosecutor's remarks were not improper. In fact, given the horrific events of September 11, we think it would have been strange indeed if anyone connected with this trial and allowed to speak to the jury on September 12—judge, prosecutor, or defense counsel—failed

to briefly comment on the attacks. The prosecutor's words were about terrorists and the need to get back to business despite the devastating attacks. They were not improper.

The defendants also argue that the Illinois statutes underlying their convictions for Medicaid and Medicare fraud are in conflict with, and therefore preempted by, federal law. Judge Scott rejected this argument when it was raised in the context of a motion to dismiss the substitute billing counts of the indictment, finding that it ignores basic rules of statutory construction and the State of Illinois' discretion to adopt standards for its medical assistance programs. We agree with Judge Scott's treatment of this issue and have nothing to add to it. *See United States v. Mitrione*, 160 F. Supp. 2d 993 (C.D. Ill. 2001).

We now turn to two sentencing issues—one an enhancement and the second a challenge to the restitution order. Judge Scott imposed a 2-level obstruction of justice enhancement under U.S.S.G. § 3C1.1 on both defendants after finding that they testified falsely at the trial. DeVore contends that she did not testify falsely and that the district court clearly erred in imposing the enhancement. Mitrione says, in his main brief, that he adopts the arguments in DeVore's brief; DeVore's brief, however, neither mentions Mitrione's obstruction enhancement nor argues that it was improper. The government's brief pointed this out, and Mitrione's reply brief ignores the point. So, as to him, this argument is waived or, more charitably, rejected as not developed.

Our review of obstruction of justice enhancements is "very limited." *United States v. Ramunno*, 133 F.3d 476, 480 (7th Cir. 1998). The determination that DeVore obstructed justice is a factual finding which we will not disturb unless it is clearly erroneous. To meet this standard, DeVore must convince us "to a certainty that the district court's factual findings were incorrect; merely suggesting the possibility of error is not enough." *Id.* at 480-81 (citing *Anderson v. City of*

Bessemer City, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)). This is an especially daunting task here as the district court's factual finding is based on an assessment of credibility, and we give special deference to the trial judge's unique opportunity to follow the case up close, here for more than 3 weeks.

DeVore repeatedly testified that she was not the biller for M&A. Judge Scott found that DeVore testified that, prior to 1997, she played no role in billing except to fold, mail, and sign the bills. The judge found that DeVore's testimony was contradicted by several witnesses at trial, implicitly found those witnesses to be more credible, and concluded that DeVore testified falsely. Now, rather than argue that her statements at trial were mistaken or the result of confusion, she maintains that her testimony was truthful and claims that the government presented no contrary testimony. We reject this claim.

As the district court found, several witnesses, including McGowan, Goff, Woods and others, established through their testimony that DeVore "orchestrated the billing processes throughout that office." These witnesses testified that DeVore instructed them on how to: (1) bill; (2) interpret codes; (3) resubmit bills that had been rejected; and (4) change the listed service date on a bill to avoid rejection of a bill for a second service on one date.

So, while DeVore maintains that her testimony was true, her claim simply cannot be squared with the evidence. In light of the testimony, the district court properly found that DeVore's statements that prior to 1997 she played no significant role in billing were false.

The district court also properly found that the testimony was material to the counts of conviction because its purpose was to mislead the jury into thinking DeVore had no decisionmaking authority in billing when clearly she did. *See*

United States v. Freitag, 230 F.3d 1019, 1025 (7th Cir. 2000) (district court's finding that Medicare fraud defendant's testimony was "a creative revision of what had happened" sufficiently found intent required to support perjury-based sentence enhancement).

DeVore also claims that the district court clearly erred in finding that she testified falsely when she said she did not participate in the decision to have Woods lead the SOSA group. While DeVore states that "no contrary testimony was offered," Judge Scott found that her testimony was contradicted by Woods, Mitrione, and Goff. Applying an obstruction enhancement to DeVore's guideline range was not error.

Finally, the defendants argue that Judge Scott erred in ordering them to reimburse Medicare because, according to them, the victim of their fraud (if in fact there was a fraud) was Medicaid. At sentencing, however, the defendants did not object to the restitution order on the ground that they now advance, *i.e.*, that Medicaid--not Medicare—was the victim of their fraud. Instead, they argued that the district court improperly calculated the amount of restitution owed. In fact, the defendants contended that the total loss to Medicare was $2,144.58 and that Medicaid should be paid nothing. So, on this record, they forfeited the issue, and our review is only for plain error. *United States v. Randle*, 324 F.3d 550, 555 (7th Cir. 2003).

Since Mitrione and DeVore were convicted of fraud, Judge Scott's authority to impose restitution is governed by the Mandatory Victim Restitution Act (MVRA) codified at 18 U.S.C. § 3663A and 18 U.S.C. § 3664. The relevant portions of the MVRA provide:

> (a)(1) Notwithstanding any other provision of law, when sentencing a defendant . . . the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .

> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense *that involves as an element a scheme, . . . any person directly harmed by the defendant's criminal conduct in the course of the scheme* . . . .

18 U.S.C. § 3663A(a)(1)-(2) (emphasis added). Thus, while restitution is limited to the counts of conviction, when the counts of conviction involve a scheme, restitution may be ordered for all of the harm caused by the defendant's criminal conduct in the course of the scheme. *See Randle*, 324 F.3d at 556; *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999).

Based upon Judge Scott's finding that the total loss caused by the defendants' fraud was $11,255, she ordered the defendants to pay restitution in that amount. We see no plain error in this order. As the judge found, both Medicaid and Medicare were victimized by the defendants' fraud, and a restitution order need not be limited to those harmed by the conduct that formed the basis for a conviction. To the contrary, the statute defines "victim" as any person directly harmed by the defendant's criminal conduct in the course of the scheme. *Martin*, 195 F.3d at 967. *See Randle*, 324 F.3d at 556 ("restitution is authorized under the MVRA . . . to a victim who is directly harmed by the offender's conduct in the course of committing an offense that involves *as an element* a scheme . . . .").

Here, the defendants were convicted of one count of mail fraud and one count of filing false claims. These counts adopted parts of counts 1 and 2, which charged the defendants with devising a scheme to defraud the Medicaid and Medicare programs of the State of Illinois and the United States. Thus, they were convicted of offenses which triggered the broad definition of "victim" under the MVRA quoted

above. Thus, because the defendants' crime included a scheme, and there is evidence that the scheme directly harmed a victim, *i.e.*, Medicare, other than the victim mentioned in the counts for which the defendants were convicted, *i.e.*, Medicaid, Judge Scott did not plainly err in ordering restitution to Medicare.

For these reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS,
SPRINGFIELD DIVISION

No. 00-30021

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants.

July 6, 2001, Decided

ORDER

JEANNE E. SCOTT, U.S. *District Judge*:

This matter is before the Court on Defendants Mitrione and Devores' Motion for Partial Dismissal of the Indictment, Motion to Strike and Motion in Limine. For the reasons set out below, Mitrione and Devores' Motion for Partial Dismissal of the Indictment is DENIED, Motion to Strike is DENIED, and Motion in Limine is DENIED.

Defendants argue that all references to substitute billing (i.e., submitting claims under Mitrione's provider number for services performed by others) as a fraudulent billing scheme should be dismissed or struck from the indictment as well as banned from the trial since substitute billing does not violate state or federal law. Defendants claim that information provided by the Government indicates that Counts 2, 7, 8, 11, 12, and 13 are partly based on the substitute billing theory,

and they claim that such billing is perfectly legal under both state and federal law. They further claim that *Federal Rule of Criminal Procedure 12(b)* permits the Court to resolve the issue now. The Court finds, however, that substitute billing is not permitted under the Illinois Medicaid statutory reimbursement provisions and regulatory provisions promulgated pursuant to those provisions. (Counts 2 and 11). The Court further finds that Counts 12 and 13 allege that the Defendants caused payments to be made for work done by a totally unqualified person, which if true, would not qualify as substitute billing in any event. Finally, Counts 7 and 8 allege that Defendants submitted a false claim knowing the claim was at least partially false. Since the Government is not required to plead its evidence, the Court cannot tell if the evidence on these Counts goes beyond the substitute billing theory which, in some instances, would be permitted with respect to the Medicare reimbursement claims in these Counts. In short, there are factual issues which preclude dismissal of any count of the indictment.

First, Defendants have argued that there is no state or federal law which prohibits substitute billing. Defendants claim the handbook provision cited by the Government in Count 2 of the indictment (A-210.7 of the "Medical Assistance Program Handbook" published by the Illinois Department of Public Aid) does not carry the effect of law and that no law is in accord with it. That provision indicated that reimbursement under Illinois Medicaid rules for psychiatric services would be limited to those which had been personally provided by the physician who submitted the bill. Defendants contend that this handbook provision is nothing more than an interpretation of the law and one which is incorrect.

The Court agrees that the handbook is only an interpretation of the law and does not carry the import of law itself. *See State of Indiana Department of Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991). However, in this instance the

handbook interpretation conforms to the language of the Illinois Administrative Code (Code), which does carry the force of law. Section 140.411 of the Code provides, in relevant part, that physicians will be reimbursed for services not otherwise excluded which are provided by the physician or by a member of the physician's staff under the physician's direct supervision. Section 140.413 of the Code is entitled "Limitation on Physician Services." It provides, in relevant part: "(a) When provided in accordance with the specified limitations and requirements, the Department shall pay for the following services: . . . (4) Psychiatric Services (A) Treatment—when the services are provided by a physician who has been enrolled as an approved provider with the Department. . . ."

Defendants have read the general provision for physician reimbursement (Section 140.411) as modifying the limiting clause for reimbursement for psychiatric services (Section 140.413), when the Code reads just the opposite. Defendants have argued that since psychiatrists are physicians, the reference to "services provided by a physician" in Section 140.314 encompasses work done by members of the psychiatrist's staff under his direction, as provided in Section 140.411. If that were the case, then there would be no need for this provision under Section 140.413. The plain language of the Code indicates that Section 140.413 limits Section 140.411. In addition basic rules of statutory construction provide that specific provisions control over the general. *Hernon v. E.W. Corrigan Const. Co.*, 149 Ill. 2d 190, 172 Ill. Dec. 200, 595 N.E.2d 561 (1992); *First Bank of Oak Park v. Avenue Bank and Trust Co. of Oak Park*, 605 F.2d 372 (7th Cir. 1979). For Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision. The reference to the Handbook provision in the indictment is therefore of no consequence since the language quoted from the Handbook conforms to

the language of the Code. The various counts adequately set out the offenses charged.

Defendants next argue that the Government required forms, to be used by a physician seeking either Medicaid or Medicare reimbursement, have a certification which the doctor must sign which states that the services for which reimbursement were sought were medically necessary and that they were personally furnished by the physician or by an employee who was under his personal direction. Defendants argue that the certification on the forms is further proof that psychiatric services performed by a physician's staff, under his direction, may be reimbursed.

The forms cannot change the requirements of law, however. Defendants may point to the forms and argue that they were confusing or misleading, if that is their position. Such a contention would go to the Defendants' intent and be relevant. This argument is not a basis for dismissing or striking parts of the indictment, however.

Finally, Defendants have argued that Medicare reimbursement rules allow substitute billing and that at least Counts 7, 8, and 14 should be dismissed. Those Counts, according to the Defendants' motion, are based in part on substitute billing for Medicare reimbursement. Even though the Government has conceded in its Response to the Motion that Medicare regulations (unlike Medicaid regulations) permit reimbursement in some circumstances for psychiatric services provided by a physician's employees under his direction, the Government did not concede the motion. The Court will need to hear the evidence, since it is unclear whether the substitute billing was otherwise proper. In addition, those Counts have other bases than just the substitute billing—they also allege that the claims were either partially false or not rendered to the extent claimed. Defendants' contention that the Court should limit the Government's evidence at trial is rejected in the absence

of a showing of any discovery rule violation by the Government.

THEREFORE, Defendants' Motion for Partial Dismissal of the Indictment (d/e 55-1) is DENIED; Defendants' Motion to Strike (d/e 55-2) is DENIED, and Defendants' Motion in Limine (d/e 55-3) is DENIED. Defendants' Motion to Extend Time to File Reply (d/e 59) is ALLOWED, and the Court has considered the Reply (d/e 60) filed by the Defendants on May 30, 2001, in connection with its rulings on the above motions. IT IS THEREFORE SO ORDERED.

ENTER: 7/6, 2001.

FOR THE COURT:

JEANNE E. SCOTT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

[Filed April 7, 2000]

Cause No. 00-30021

18 U.S.C. § 2
18 U.S.C. § 287
18 U.S.C. § 371
18 U.S.C. § 1341
18 U.S.C. § 1347

UNITED STATES OF AMERICA
Plaintiff,

v.

ROBERT T. MITRIONE AND MARLA A. DEVORE
Defendants.

INDICTMENT

THE GRAND JURY CHARGES:

Count 1

1. From in or about October 1, 1994 through in or about January 3, 1998, the exact dates being unknown to the Grand Jury,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did unlawfully and knowingly combine, conspire, confederate and agree with each other, and with persons known and unknown to the Grand Jury, to commit

one or more of the following offenses against the United States:

a. To wilfully submit to the United States Department of Health and Human Services, through the Illinois Department of Public Aid and/or the Health Care Services Corporation, claims for services allegedly provided, knowing such claims to be false, fictitious or fraudulent in violation of Title 18, United States Code, Section 287;

b. To devise a scheme or artifice to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations or promises, through the use of the United States mail in violation of Title 18, United States Code, Section 1341;

c. To knowingly and willfully execute, or attempt to execute, a scheme or artifice to defraud any health care benefit program and to obtain, by means of false and fraudulent pretenses, representations and promises, any of the money or property owned by, or under the custody and control of, any health care benefit program in connection with the delivery of and payment for health care benefits, items, and services in violation of Title 18, United States Code, Section 1347; and

d. To defraud the United States.

2. At all times material to this indictment, Medicare was a program established by the federal government as a health care benefit program for the elderly and disabled as part of the Social Security Act, and codified in Title 42 of the United States Code. Medicare provided free or below-cost health care benefits to eligible beneficiaries, primarily individuals who were at least sixty-five years of age or who had certain disabilities. Medicare is administered nationally by the Health Care Financing Administration, and at the local level by "carriers" who handle claims from providers such as physicians.

3. The Health Care Financing Administration (HCFA) established procedures to compensate physicians for services provided to the disabled and elderly qualified under the Medicare program. In the State of Illinois, HCFA administered the Medicare program through a private insurance carrier, the Health Care Service Corporation (HCSC). Under that administration, HCSC reviewed and processed claims for medical reimbursement submitted by Medicare providers, and made payment on those claims which appeared to be eligible for medical reimbursement under the Medicare program. Such payment involved federal funds. Providers were required to submit invoice forms to HCSC which received, processed and authorized payment to providers for services covered under the Medicare program according to the rules, regulations and procedures established.

4. The Medicaid program of the United States and the State of Illinois was established in 1965 to provide medical assistance to indigent persons. At all times material herein, the Illinois Department of Public Aid (IDPA), administered the Medicaid program for the State of Illinois. The United States of America provided at least one half of the money for the Medicaid program, with the remaining cost provided by the State of Illinois.

5. The Illinois Department of Public Aid established procedures in accordance with the regulations of the United States Department of Health and Human Services (HHS) to compensate physicians for services provided to medical assistance recipients. Providers were required to submit invoice forms to IDPA which received, processed and authorized payment to providers for services covered under the Medicaid program according to the rules, regulations and procedures established.

MANNER AND MEANS OF THE CONSPIRACY

Billing for Services Performed by Unqualified Therapist

6. It was a part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including Medicaid, Medicare, and other health care plans and private individuals for services performed by one or more unqualified individuals.

Billing for Services of Robert T. Mitrione Rendered by Others

7. It was a further part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including Medicaid, Medicare and other health care plans through the use of his individual provider number, which represented that individual medical psychotherapy had been rendered by a medical doctor, and which would therefore be covered by the payer's plan when, in truth and in fact, services had been provided by others whose services were not covered by the payer's plan, or were not covered without a provider number issued individually to that counselor.

Billing for Services Never Rendered (False Billing)

8. It was a further part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including Medicaid, Medicare and other health care plans for services that were not performed.

Billing Medication Management As Psychotherapy (Upcoding)

9. It was a further part of the conspiracy that ROBERT T. MITRIONE and MARLA A. DEVORE would submit and cause to be submitted claims to health care plans, including

Medicaid, Medicare and other health care plans for services using CPT codes 90843 (20-30 minute therapy session) and 90844 (45-50 minute therapy session) when in truth and fact, only brief visits and medication management with the patient had occurred, which could have been billed at a lower rate under CPT Code 90862 (pharmacologic management).

10. In furtherance of the conspiracy and to effect its objects,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, committed one or more of the following overt acts:

OVERT ACTS

11. During the time of the conspiracy, ROBERT T. MITRIONE, MARLA A. DEVORE and others at their direction, submitted various claims to IDPA for payment by the State of Illinois Medicaid program, which claims included requests for payment for services provided by Dr. Robert T. Mitrione which in fact had not been provided by Dr. Robert T. Mitrione or not provided to the extent claimed.

12. During the time of the conspiracy, various claims were submitted by ROBERT T. MITRIONE, MARLA A. DEVORE and others at their direction to IDPA for payment by the State of Illinois Medicaid program and to HCSC for payment by the Medicare program, which claims included requests for payment for services provided by one or more persons unqualified to conduct such services.

13. During the time of the conspiracy, various claims were submitted by ROBERT T. MITRIONE, MARLA A. DEVORE and others at their direction to IDPA for payment by the State of Illinois Medicaid program and to HCSC under the Medicare program, which claims included requests for payment for services provided by Dr. Robert T. Mitrione or others, when in fact, no services were performed.

All in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

Count 2

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 13 of Count 1 of this indictment as though fully set forth herein.

2. From at least on or about October 1, 1994 through on or about January 3, 1998, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud the Medicaid and Medicare programs of the State of Illinois and the United States of America.

3. At all times material to this scheme to defraud, ROBERT T. MITRIONE was a medical doctor specializing in psychiatry and doing business as "Mitrione and Associates" from an office located in Springfield, Illinois.

4. At all times material to this scheme to defraud, MARLA A. DEVORE was the "office manager" for Mitrione and Associates. As such, she was in charge of the process of scheduling patients and billing for services rendered by Dr. Mitrione and others involved with Mitrione and Associates. As part of this employment, DEVORE supervised and trained others who participated in scheduling patients and billing for services.

5. At all times material to this indictment, as outlined in Count 1 of this indictment, IDPA had certain rules and regulations which it published for providers in the Medicaid program. Among the published rules, regulations and procedures listed in the IDPA "Medical Assistance Program Hand-

book" were regulations regarding the types of psychiatric services which could be billed to IDPA. These regulations included section A-210.7, which, in part, provided:

> The provision of psychiatric services is limited to those services and associated procedure codes listed in Appendix A-19a and must be *personally* provided by the physician who submits charges. Services provided by a psychologist, social worker, etc. are not reimbursable.

6. At all times material herein, ROBERT T. MITRIONE was a "provider" under the Medicaid program. That is, ROBERT T. MITRIONE was approved by IDPA and the United States Department of Health and Human Services to administer services to Public Aid clients and to receive compensation for the services. In applying to be a Medicaid provider, ROBERT T. MITRIONE agreed, in writing, "on a continuing basis, to comply with all current and future program policy provisions as set forth in the applicable Department of Public Aid Medical Assistance Program handbooks."

7. In submitting claims to IDPA for services, the individual providing the service is identified by a unique "provider number." Thus, when the provider number issued individually to ROBERT T. MITRIONE was used in billing, IDPA was advised that the services were provided by ROBERT T. MITRIONE, a physician.

8. During the period of time from on or about October 1, 1994 through on or about January 3, 1998, ROBERT T. MITRIONE and MARLA A. DEVORE, and others at their direction and within their control and supervision, knowingly submitted claims to IDPA under the name and provider number of Robert T. Mitrione, M.D., when, in fact, it was known to both ROBERT T. MITRIONE and MARLA A. DEVORE that the services, if any, were provided by someone other than Robert T. Mitrione.

9. On or about August 18, 1995, in the Central District of Illinois,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on July 18, 1995 to a client identified as TB, as well as services claimed to be rendered on July 13, 1995 to a client identified as BD, which services were not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 3

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. In addition to submitting bills which advised IDPA that the services were provided by ROBERT T. MITRIONE, during the period of time from October 1, 1994 through on or about January 3, 1998, claims were submitted to the Illinois Department of Public Aid for services that were not rendered, or not rendered to the extent billed. For example, claims were submitted to the Illinois Department of Public Aid for services allegedly performed for patients that were not rendered at all, bills were submitted for full psychotherapy sessions when only minimal sessions or medication management sessions were provided, and bills were submitted for office sessions that were either canceled or the patient did not

appear in the office of Mitrione and Associates on the date(s) indicated.

3. On or about November 14, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on October 29, 1997 to a client identified as SO, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 4

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about November 4, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Illinois Department of Public Aid, a claim for services purportedly rendered

by ROBERT T. MITRIONE, M.D. on or about October 29, 1997 to a client identified as SO, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 5

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about October 16, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on October 1, 1997 to a client identified as RF, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 6

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about August 1, 1995, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Illinois Department of Public Aid, a claim for services purportedly rendered by ROBERT T. MITRIONE, M.D. on or about July 18, 1995 to a client identified as TB, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 7

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about September 3, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a check and "Medicare Remittance Notice" mailed from the Health Care Service Corporation (HCSC), and mailed to Robert T. Mitrione, M.D., 3021 Montvale, Suite D, Springfield, Illinois 62704-4262 which was a Medicare payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on June 14, 1996 to a client identified as KP, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 8

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about August 3, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Health Care Service Corporation, a claim for services purportedly rendered by ROBERT T. MITRIONE, M.D. on June 14, 1996 to a client identified as KP, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 9

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about September 2, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Health Care Service Corporation, a claim for services purportedly ren-

dered on August 29, 1996 to a client identified as KP, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 10

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about November 13, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a check and "Medicare Remittance Notice" mailed from the Health Care Service Corporation (HCSC), and mailed to Robert T. Mitrione, M.D. 3021 Montvale, Suite D, Springfield, Illinois 62704-4262 which was a Medicare payment for one or more services claimed to have been rendered on October 13, 1997 to a client identified as BD, which service was not rendered or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 11

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about August 15, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEYORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on July 12, 1996 and July 16, 1996 to a client identified as BC, which was not rendered by ROBERT T. MITRIONE, or not rendered to the extent billed;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 12

1. The Grand Jury realleges and reaffirms paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. During a period of time from in or about May of 1996 and continuing through in or about March, 1997, at the direction of Robert T. Mitrione, a "support group" of "survivors of sexual abuse" was organized by one or more counselors in the office of Mitrione and Associates. Initially, this support group was handled by MARLA A. DEVORE as well as by another counselor who was attempting to qualify for a license to practice as a psychologist in the State of Illinois. Shortly after the support group was started, MARLA A. DEVORE stopped taking any active part in the group therapy sessions, but continued to oversee the billings.

3. During the period from at least in or about August; 1996 through at least in or about February, 1997, ROBERT T. MITRIONE and MARLA A. DEVORE directed an individual with no license, qualifications or education as a professional mental health counselor to co-lead this group, over the protest of the other counselor. On certain occasions during this time, MITRIONE and DEVORE directed the unqualified individual to "handle" the group on his own. During all of this time, members of the group, their insurance companies, the Medicare program and the Illinois Department of Public Aid were billed as if Robert T. Mitrione personally provided services to each member of this group.

4. On or about January 27, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a warrant (check) and remittance advice mailed from the State of Illinois Office of the Comptroller and mailed to Mitrione, Robert T., 3021 Montvale, Suite D, Springfield, Illinois 62704 which was a Medicaid payment for one or more services claimed to have been rendered by ROBERT T. MITRIONE on November 14, 1996 to a client identified as LE, which was not rendered by ROBERT T. MITRIONE, and was, in fact rendered by one with no license, education or qualifications to render such service;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 13

1. The Grand Jury realleges and reaffirms paragraphs 1 through 8 of Count 2 of this indictment and paragraphs 1 through 3 of Count 12 as though fully set forth herein.

2. On or about April 3, 1997, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, for the purpose of executing said scheme did knowingly cause to be delivered by the United States mail, according to the direction thereon, an envelope containing a check and "Medicare Remittance Notice" mailed from the Health Care Service Corporation (HCSC), and mailed to Robert T. Mitrione, M.D., 3021 Montvale, Suite D, Springfield, Illinois 62704-4262 which was a Medicare payment for one or more services claimed to have been rendered by Robert T. Mitrione, M.D. on November 19, 1996 and December 4, 1996 to a client identified as PH, which services was not rendered by Robert T. Mitrione, M.D. or not rendered to the extent billed and were, in fact rendered by one with no license, education or qualifications to render such services;

All in violation of Title 18, United States Code, Sections 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 14

1. The Grand Jury realleges and reaffirms the allegations in paragraphs 1 through 8 of Count 2 of this indictment as though fully set forth herein.

2. On or about November 15, 1996, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendants herein, did present and cause to be presented to the Department of Health and Human Services, a Department of the United States of America, through the Illinois Department of Public Aid, a claim for services purportedly rendered by ROBERT T. MITRIONE, M.D. on or about November 14, 1996 to a client identified as BT, knowing said claim was at least partially false, fictitious and fraudulent when made;

In violation of Title 18, United States Code, Sections 287 and 2.

THE GRAND JURY FURTHER CHARGES:

Count 15

1. From at least on or about August 22, 1996 through on or about January 3, 1998, in the Central District of Illinois,

ROBERT T. MITRIONE and
MARLA A. DEVORE,

defendant herein, did knowingly and intentionally execute and attempt to execute a scheme and artifice to defraud one or more health care benefit programs and to obtain, by means of false and fraudulent pretenses, representations and promises the money or property owned by, and under the custody and control of one or more health care benefit programs, specifically the Medicaid and Medicare programs of the State of Illinois and the United States of America in connection with the delivery of or payment for health care benefits, items and services.

All in violation of Title 18, United States Code, Sections 1347 and 2.

/s/ Frances C. Hulin
Frances C. HULIN
United States Attorney

A True Bill.
/s/ [Illegible]
Foreperson

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

[Filed August 23, 2002]

No. 00-30021

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT MITRIONE AND MARLA DEVORE,
Defendants.

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE JEANNE E. SCOTT
U.S. DISTRICT JUDGE

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* * * *

[4] versus Westmoreland, 240 F.3rd 618, 7th Circuit, 2001.

That case held that a new trial is warranted;

One, when the court is reasonably well-satisfied that the testimony given by a material witness was false.

Two, the jury might have reached a different conclusion absent the false testimony or if it had known that testimony by a material witness was false.

And three, the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after the trial.

The first inquiry is was there false testimony. The answer clearly is yes. For example, at the trial the Government's

summary witness, Ms. Statler, testified in response to Mr. Hansen's question as follows:

"Question; And did you look at whether a claim was filed?

"Answer; Definitely."

In the hearing on the motion for new trial, however, Ms. Statler testified that she was unaware that some of the allegedly undocumented claims included instances where a claim form had been placed in the patient's office file but the claim had not actually been submitted to Public Aid for payment. She testified in the hearing on the motion for new trial that she had not checked the Public Aid records [5] to verify which claims had actually been filed. She just had a printout of claims paid. The implication of her trial testimony is that she checked with Public Aid records to be sure that all of the 1,178 she said undocumented claims had been submitted for payment, and she had not.

At trial Ms. Statler further testified as follows:

"Question; And in making that spread sheet, 20A, did you do the best you could to eliminate any hospital codes or when there was any indication that there was some occurrence at the hospital?

"Answer; Right, if it was clearly a hospital record, we eliminated that."

Later on cross examination by Attorney Smith the following took place:

"Question; And you said that looking at the bills, claims that were submitted by Dr. Mitrione, you tried to eliminate any obvious hospital codes, is that right?

"Answer; Yes.

"Question; What would those codes be?

"Answer; Place of service code would be other than office. There's a place of service code on the bill."

Thereafter there was a discussion of service codes and then the following questions and answers:

"Question; But did you—were some of these codes eliminated by you because they were in the hospital?

[6] "Answer; No, we looked at place of service.

"Question; Okay. So on a claim form there's a place of service. And if it had hospital as place of service, you eliminated it? If it didn't, you kept it in there, is that right?

"Answer; That's right."

And later on redirect examination the following took place:

"Question; Looking at Defendant's Exhibit 2, does that appear to be a claim form for the IDPA?

"Answer; Yes, that's it.

"Question; And is there a place on this claim form that has the initials P.O.S.?

"Answer; Yes, that's it.

"Question; What is P.O.S.?

"Answer; Place of service.

"Question; And what does that mean?

"Answer; That's to indicate whether the place of service was at the doctor's office, at the hospital, or an outpatient, or a home, or anywhere else.

"Question; So for instance, if it was at a hospital, there would be a different number there than if it's at the office?

"Answer; Yes.

"Question; If it's at Libertase, an outpatient [7] facility, would it be something different than at the office?

"Answer; Yes.

"Question; And were you able to exclude all of those that had anything other than office codes?

"Answer; Yes.

"Question; Was that to get a picture of the number of billings for the office visits?

"Answer; Yes."

At the hearing on the motion for new trial Ms. Statler testified that they eliminated from the list of undocumented claims those that had an out of—excuse me, those that had an out of office place of service indicated as long as there was also documentation in the patient file reflecting that treatment had been given at the hospital. Her trial testimony lacked that qualification, although she was repeatedly asked about what steps had been taken to exclude claims for hospital visits. Her trial testimony was false. Her testimony that the 1,178 undocumented claims did not include claims for services rendered at a hospital was false to a dramatic degree.

Also at trial she testified that she personally had done the calculations for Government Exhibit 20A. She testified as follows;

"Question; Ma'am, in conducting the analysis to which [8] you've testified, did you manually count up each of the instances to make up these percentages?

"Answer; Yes, I did.

"Question; But you did not manually count up all of them, correct?

"Answer; I didn't count what?

"Question; You did not manually count up all of them, correct?

"Answer; Yes, we counted—I mean I counted all of them. I went through here and counted the number of instances."

At the hearing on the motion for new trial Ms. Statler testified that she did not do all of the counting for her analysis given at trial. She testified she had been assisted by Landers and Traylor in doing the counting. Her trial testimony in this case was false.

The next question is whether Ms. Statler was a material witness for the Government at trial.

In terms of refuting the defense to the charges based on ghost billing and upcoding at least, she was. The defense to these charges was that the Defendants were inept and ignorant of proper billing procedures and made many mistakes in billing, but that these mistakes were not intentionally made or made with the intent to defraud.

In support of that defense we heard testimony [9] primarily from Defendant DeVore of instances when a patient had seen Mitrione and another therapist, for example herself or Ms. Goff, in close proximity, and a bill was sent for Mitrione's rate when the service charge should have been for the lower rate of the other therapists, if billed at all.

She also testified to instances where services were rendered which would have qualified for reimbursement but no bill was sent.

Defense witness Parker presented a summary exhibit showing that with respect to the patients specifically referenced in the indictment, the ratio of instances where there had been a billing without service compared to the instances where there had been service noted without billing, was nearly 1 to 1.

Ms. Statler was the Government's witness who refuted that 1 to 1 ratio. She testified that for the period of time reflected in the charges in the indictment, based on a review of all

charges for services billed for which there was no documentation in the file, and services noted in the patient files for which charges could have been made but weren't, the charges without an accompanying service exceeded the instances where there were services but no charges by over 3 to 1. She testified to an actual differential of 28 percent to 9 percent. Even if the [10] obvious math error on Government Exhibit 20B is corrected, her testimony would still have indicated a differential of 2.64 to 1.

She was the only Government witness to refute the defense witness Parker as to the difference in claims without services recorded versus services recorded without claims. Therefore, she was a material witness on at least the ghost billing and upcoding charges contained in the allegations.

The next issue is might the jury have reached a different verdict without the testimony of witness Statler or if the jurors had known that the testimony of witness Statler was false?

It is, of course, impossible for the Court to know which bits of evidence the jury found the most persuasive in reaching its decisions. However, for purposes of this motion I am to look at the false testimony and determine whether the verdicts might have been different either without the trial testimony of Ms. Statler, or if the jury had known that part of Ms. Statler's testimony was false.

From a statistical analysis alone I have to conclude that at least as to the ghost billing and upcoding charges the verdicts might have been different.

Look at Exhibit 20A, for example, in light of Mr. Knobloch's testimony that was given at the hearing on the

* * * *

[17] took him two months to review it and come to his conclusions.

If means existed for the Defendants to know that the summary exhibit of the Government's was false, then the same means were also available to the Government. And the Government should have told us if it knew. I'm of the opinion that Mr. Hansen did not knowingly put false testimony on at trial. But the defense didn't discover the falsity of the evidence until after trial and they were unable realistically to meet it at trial, in part because of the witnesses' insistence that claims arising out of office were excluded. And that naturally misdirected defense counsels' cross examination. I find that the third prong of the test has been met.

The final question is what part or all of the charges were affected by the untruthful testimony. The evidence of we had as many claims that we could have legitimately made but didn't for services rendered as those we did for services not documented goes to the issue of Defendants' intent on at least the ghost billing charges. For those charges, the statistical testimony of Ms. Statler was relevant to the defense and adversely impacted it if the jury gave any weight to this defense, and I have to assume that it might for purposes of this motion.

For the counts of the indictment which included ghost [18] billing I find a new trial must be granted. I also find that Ms. Statler was a material witness on the charges related to substituted billing and upcoding and confusion of billing between Mitrione and Goff.

Counts 12 and 14 of the indictment listed as Counts 12 and 13 on the verdict form, however, are of a different category. These are charges arising from bills submitted to Medicaid for Dr. Mitrione when the services were provided by Walt Woods in leading the SOSA group, a group he wasn't professionally qualified to lead per Dr. Baer, or even co-lead with an intern per defense—excuse me, defense expert Bornstein. And they were for services at a time when the Defendants were either in Texas or had just returned home from Texas and were not in

the office and wouldn't have been available to intervene, because according to them they didn't know the particular session was even occurring. And Woods didn't know they were at home.

The bill in Count 12 related to patient L.E., who didn't get alcohol and drug counseling, even though that is, the only thing Woods was licensed to provide. The defense primarily was that Dr. Mitrione thought Woods was qualified because the group members had dependency issues. And Marla DeVore didn't want to co-lead the group, and he thought it would be better to have two. And there was a throw in [19] comment that he had told Woods not to see Medicaid patients even though he designated Woods to co-facilitate a group that had Medicaid patients in it.

Woods testified that in September of 1996, he had a discussion in the office with Marla DeVore. It was discussed that the group seemed to run better with him and the Defendants didn't see anything wrong with him running the group. Marla DeVore and Goff had run the group before, but Marla DeVore wanted out of it and didn't want to work with Goff.

Both Defendants knew Woods was leading or co-leading the group. Both reviewed the monthly reimbursements from Public Aid and the allocation to particular therapists. There was no evidence on these counts of the confusion of bill ing. There was no evidence on these counts to support a confusion in billing for one therapist when another provided the services here or a mistake on the date of billing with respect to these counts.

The issues raised by the summary exhibits and summary witnesses in my judgment did not go to those two counts. Count 14 dealt with individual and group therapy on November 13th and November 14th by Woods for patient B.T. when the Defendants were in Texas. But also was a patient without drug and alcohol problems. Again with respect to Count 14, I

find that summary witness's testimony unrelated [20] to the issues raised in Count 14.

Finally, the defense argued that a Brady violation occurred in that the Government suppressed evidence. I find, however, that the evidence was not suppressed. It was all there and presented to you. It was a sloppy, inaccurate analysis of the evidence by the Government witness. An incorrect, wrongful analysis, but there was no suppression of the evidence itself.

Therefore, after reviewing the charges in each count of the indictment and the evidence presented in each count, and giving the benefit of the doubt to the Defendants in any instance where a charge was based in whole or in part on evidence where the verdict might have been influenced by the false testimony, I allow the Defendant's joint motion for new trial based upon newly discovered evidence as to Defendant Mitrione on Counts 1, 2, 3, 4, 5, 6, 9, 10, 11, and 15. The Court further allows the motion for new trial as to Defendant DeVore on Counts 1, 3, 4, 5, 9, 10, 11, and 15 of the indictment. The convictions on the above counts are vacated.

The motion is further denied as-to both Defendants on Counts 12 and 14 of the indictment. I wish to note that Count 14 of the indictment in the verdict form was labelled as Count 13 for reasons discussed at the time. The convictions on Counts 12 and 14 of the indictment as to [21] each Defendant remain in effect.

The Court orders the Government to advise the Court and opposing counsel by September 3rd, 2002, whether it will re-try the Defendants on the charges in the counts for which the motion for new trial has been allowed. If the Government elects to re-try these counts, the Court orders the parties to file any additional pre-trial motions limited to matters affected by the ruling on the motion for new trial by October 1, 2002. The Court deems that all other pre-trial motions previously filed and ruled upon have again been filed, so that those issues are

preserved, and the Court adopts its prior rulings with respect to it.

Jury trial will be set for January 13th, 2003 at 9 a.m. A final pre-trial conference will be held on December 13th, 2002 at 3:30 p.m. If the Government elects not to re-try the Defendants on the charges and the counts for which the motion for new trial has been allowed, then the Probation Department is ordered to file a second revised Pre-Sentence Report by September 20th, 2002, addressing any matters which need to be revised as a result of the Court's ruling this date. A sentencing hearing will in that event be held at 1:30 p.m. on October 2—excuse me, October 31st, 2002.

I have prepared a minute entry with those dates and directions, which the Clerk has and will make available to [22] you today.

That is my ruling. That is all I have for you. We're in recess.

(Court recessed.)

I, KATHY J. SULLIVAN, CSR, RPR, Official Court Reporter, certify that. the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathy J. Sullivan
KATHY J. SULLIVAN
License # 084-002768

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 02-4222 & 02-4224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT T. MITRIONE and MARLA A. DEVORE,
Defendants-Appellants.

March 25, 2004, Decided

ORDER

On February 23, 2004, the defendants-appellants filed a petition for rehearing. All the judges on the original panel havevoted to deny a rehearing. The petition is therefore DENIED.

GOVERNMENT EXHIBIT
20B
00-30021

MITRIONE AND ASSOCIATES

MEDICAID FILES REVIEWED FROM 10/1/94-1/03/98

1. NOTE OR INDICATION OF SERVICE IN FILE, NO CLAIM: 446/4073= 9%
2. NO NOTE OR INDICATION OF SERVICE, CLAIM SUBMITTED: 1178/4073=28%

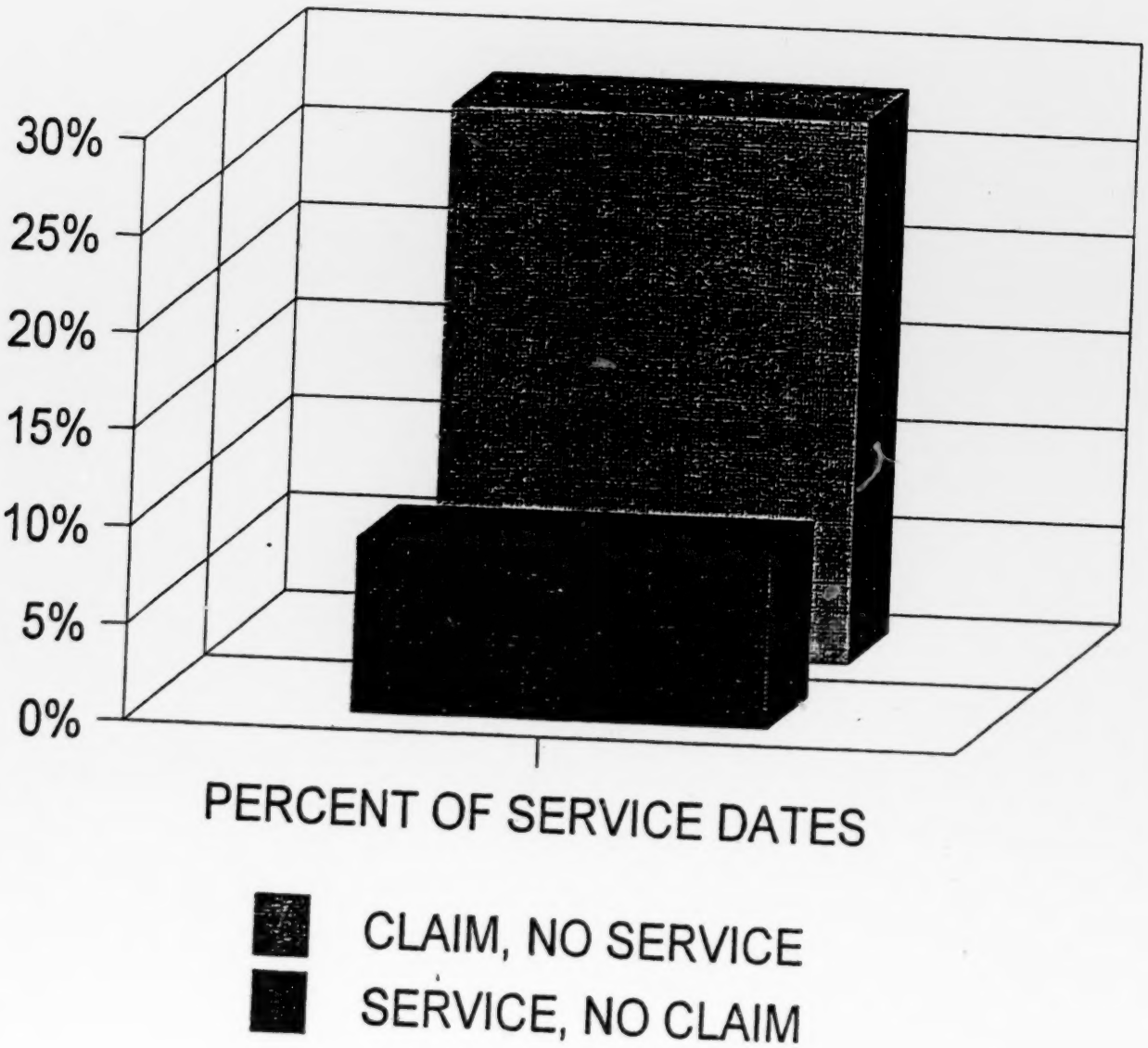


EXHIBIT
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(2)

Supreme Court, U.S.
FILED
JUL 2 - 2004
OFFICE OF THE CLERK

No. 03-1668

IN THE

Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

4. Whether the increase in defendants' sentences based on findings never made by a jury violated their Sixth Amendment right to trial by jury under *Blakely v. Washington*, 2004 WL 1402697, ___ S. Ct.___, decided June 24, 2004.

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PETITION FOR A WRIT OF CERTIORARI

Robert T. Mitrione and Marla A. DeVore respectfully petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. to Petition 1a-17a) is reported at 357 F.3d 712. The opinion of the district court (App. to Petition 40a-49a), which vacated most but not all convictions, is unreported. The opinion of the district court (App. to Petition 18a-22a), which denied a motion for partial dismissal of the indictment, is reported at 160 F. Supp. 2d 993.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 9, 2004. A timely petition for rehearing was subsequently filed on February 23, which was then denied on March 25 (App. to Petition 50a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST., AMEND. VI.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15(8) the Petitioners respectfully supplement their Petition for Certiorari, filed on June 16. This Court issued *Blakely v. Washington*, U.S. LEXIS 4573, ___ S. Ct. ___, on June 24, 2004. This supplement calls attention to this new case that was not available at the time of filing the Petition for Certiorari.

The trial court substantially increased the Petitioners' sentences beyond the statutory maximum as defined in *Blakely*, based on findings never made by a jury. The increase in sentences relied on allegations neither presented in the indictment nor proven to a jury beyond a reasonable doubt. The jury instructions did not include the increased dollar loss cited at sentencing, nor did the instructions address any finding as to vulnerable victim, obstruction of justice or abuse of trust. Rather, the judge increased the sentences by relying on allegations never decided by a jury.

The indictment charged the petitioners with one count of conspiracy to defraud the United States in violation of 18 U.S.C. §371, eight counts of mail fraud in violation of 18

U.S.C. §1341, five counts of filing false claims in violation of 18 U.S.C. §287, and one count of health care fraud in violation of 18 U.S.C. §§1347 and 2. After one of the mail fraud counts was dismissed, a jury, after a three-week trial, convicted Mitrione on all counts except two and DeVore on 10 of the 14 counts against her. After the verdict, the defendants filed a motion for new trial based on newly discovered evidence claiming that a government witness committed perjury during the trial. The trial judge found that perjury indeed occurred and that it tainted all of the counts of conviction except the two counts that involved "incident to" (or substitute) billing.

At sentencing the court found the base sentencing guidelines to be level six for each defendant pursuant to U.S.S.G. §2B1.1(a). This base guideline establishes a range of confinement from zero to six months for both defendants. This base sentence is the statutory maximum permitted based on the jury's verdict. But the court substantially increased this base guideline for both defendants. The increased penalty was based on judicial findings neither submitted to the jury nor found by the jury beyond a reasonable doubt. Pursuant to U.S.S.G. §2B1.1(b)(1)(c) the Court set the loss at $11,934.05 and ordered a four-level enhancement for loss.

The court gave the petitioner Mitrione a two-level enhancement for vulnerable victim pursuant to U.S.S.G. §3A1.1(b)(1) and a two-level enhancement for abuse of trust under U.S.S.G. §3B1.3 and two levels for obstruction pursuant to U.S.S.G. §3C1.1. For petitioner Mitrione this yielded a sentencing range of 21 to 27 months and a sentence of 23 months was imposed. This represents almost a four-fold increase in his sentence. Petitioner DeVore received the same base level of six and the same enhancements except she did not receive an enhancement for abuse of trust. This yielded a guideline range of 15 to 21 months. Devore was sentenced to 15 months. App. to Supplement, *infra*, 1a-11a.

This sentencing violates the holding of *Blakely v. Washington*, 2004 U.S. LEXIS 4573, ___ S.Ct. ___, decided June 24, 2004.

REASON FOR GRANTING THE PETITION

A. The Decision Below Deprived Defendants of Their Sixth Amendment Right to Trial by Jury by Substantially Increasing Their Sentences Based on Findings Never Made by the Jury.

The decision below violated defendants' constitutional right to a jury trial.

The verdict rendered by the jury set a base guidelines sentence of level six. U.S.S.G. §2B1.1(a). The court then made factual findings with a preponderance of the evidence standard to impose several enhancements to the Petitioners' sentences. This Court in *Blakely* held that the statutory maximum sentence under a guidelines system is "the maximum sentence the judge may impose *solely on the basis of the facts reflected in the jury's verdict or admitted by the defendant*." 2004 U.S. LEXIS 4573, *13-*14 (emphasis in original). "In other words, the 'statutory maximum' is not the sentence the judge can impose after finding additional facts, but the maximum he can impose *without* any additional findings." *Id.* *14 (emphasis in original).

Here the base level is six, with a sentencing range of 0-6 months in this case. Sub judice, the sentencing court made several findings in order to impose the greater sentences at issue here. The court had to make factual findings to add the additional four levels for relevant conduct. The court had to make additional findings beyond the jury's verdict to impose the vulnerable victim, abuse of trust, and obstruction of justice enhancements. App. to Supplement, *infra*, 11a-14a. These judge-determined facts increased Mitrione's sentence almost fourfold, and more than doubled Devore's sentence beyond the facts found by the jury alone. This Court in

Blakely has held that such actions violate the Sixth Amendment's right to a jury trial.

Petitioners' direct appeal is pending and thus they are subject to the *Blakely* standard. *Griffith v. Kentucky*, 479 U.S. 314 (1987). "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. The enhancement of petitioners' sentence here was in violation of the standard promulgated in *Blakely*.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted with this fourth Question Presented.

Respectfully submitted,

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July 2, 2004

APPENDIX



APPENDIX

[164] it is untainted in my judgment by the false testimony of Ms. Statler.

In a civil case obviously much more would be ordered refunded, even if things were taken by mistake. Many, many dollars were taken and received improperly. But for this criminal case, I am limiting the amount of loss for the criminal sanction to $11,255.65.

Next there are objections to the vulnerable victim enhancement. That enhancement was essentially given to the Defendants for placing sexual assault survivors, abuse survivors into the care of Walt Woods, who didn't have the qualifications to handle such a group, and then Medicaid was billed. Defendant Mitrione I believe objected to the enhancement saying the victims don't qualify as vulnerable. Defendant DeVore objections to the enhancement saying she wasn't part of the decision to put Woods in charge of the group.

The Guidelines 3A1.1(b)(1) indicate the enhancement is given if a defendant knew or should have known that a victim of the offense was a vulnerable victim., The 2001 Guidelines application note states, "Vulnerable victim means a person who is a victim of the offense of conviction and any conduct for which the defendant is accountable who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to [165] the criminal conduct."

The November 1, 1998 Guidelines changed 3A1.1(b) from reading, "If the Defendant knew or should have known that a victim of the offense was unusual vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by two levels"; to—it was changed to read as, "If the Defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by two levels if (A) Subdivision 1

applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under Subdivision 1 by two additional levels."

Before the November 1 of '98 amendment, the application Guideline read, "victim includes any person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under Section 1B1.3 which is relevant conduct." I'm going through this to show that the net effect is that the specific language of the enhancement applying to those who are unusually vulnerable due to age, physical or mental condition, or who were particularly susceptible to the conduct was moved from the Guideline to the application note by the '98 amendment.

In this case the enhancement applies regardless of which Guideline book the Court uses. And in my judgment it [166] applies to both Defendants. The patients of Mitrione and Associates were mental health patients. As a group they were less prepared to challenge and verify the credentials of those providing the services and the bills on their behalf than those not suffering from mental illness. In that sense you could say that they were particularly vulnerable to the Defendants fraud.

I do not rely on that, however. Beyond that, the victims of the sexual assault survivors group were a subclass, if you will, of mental health patients who were particularly vulnerable. Several testified they never would have attended a group if they had known of Woods' limited credentials. Dr. Berryman, who was the defense trial expert, acknowledged that of all mental health patients, those who suffered sexual abuse can be pretty volatile and fragile. He testified that they are complex and can be hurt if the treater is not careful. He testified he would not have a CADC alone treat survivors of sexual abuse, and he wouldn't have a CADC co-facilitate a group of survivors of sexual assault with a psychology intern. That's what was done here.

Therefore, Dr. Mitrione's objection that these individuals aren't vulnerable victims is rejected. And with respect to Ms. DeVore's contention that she had nothing to do with the decision to place Woods as a [167] co-facilitator of the group, I find that the testimony on balance disputes that. Ms. Kuethe testified that both Defendants together told her that Woods would be a co-therapist for the group. When she objected to his lack of qualifications, both Defendants told her Woods was a qualified therapist.

Dr. Mitrione indicated in his testimony that the selection of Woods to participate was made jointly with the staff. Woods testified that he had a conversation with Ms. DeVore, she told him that they didn't see anything wrong with Woods running the group. Each Defendant was aware of the limitations and problems of the group members. Ms. DeVore had been a leader of the group previously. Each was aware of Woods' lack of credentials, each participated in my judgment in the decision to put Woods in charge of the group, therefore the enhancement applies to both Defendants.

The Government's objection to the Pre-Sentence Report that this should be a four level enhancement instead of a two is rejected because in the Court's Opinion the group number here was not sufficiently large to warrant a four level enhancement. So the Court overrules that objection as well.

Next we have the abuse of trust enhancement. The Pre-Sentence Report gives this enhancement to each [168] Defendant. Medical service providers certainly occupy a position of trust with respect to private or public insurers in that they have significant discretion and a lack of supervision in deciding the type and quality of services that are necessary and appropriate for these patients. Medicaid needs to be able to rely on the honesty and integrity of physicians in their medical findings, diagnosis, and treatment. And Medicaid needs to be able to rely on the physician's representations that

the treatments for which Medicaid was billed were in fact performed and performed by the doctor himself in this instance.

Dr. Mitrione was the party authorized by Medicaid to provide psychiatric services in this case. He was the one clearly who abused the trust placed in him by the public insurer. Therefore, I find the enhancement applies to him.

Ms. DeVore was not the Medicaid authorize provider. And since I have given her the vulnerable victim enhancement, I find she should not be given the enhancement for position of trust. I fear with respect to her that there is a danger of double enhancement. I recognize that she was an active, more than active participant in the office. She was much more than an office manager. An argument can be made that she should get this enhancement as well. But I am of the Opinion that it is too close a case in her situation and I do not give her that [169] enhancement. So her objection to this enhancement is sustained.

The next enhancement is for obstruction of justice. And I'm going to address that with respect to Ms. DeVore first. The two aspects of her testimony that in my judgment do qualify for this enhancement are her denial of knowledge of the improper billing practices of the office and her statement that she was not involved in the decision to have Woods participate in the second SOSA group.

I recognize that for this enhancement to apply at all the Court must find that the Defendant testified under oath and gave a false statement concerning a material matter with the willful intent to provide false testimony rather than as a result of confusion, mistake, or faulty memory.

Her testimony that until 1997 she played no role in billing except to fold, mail, and sign bills, and her repeated testimony of "I was not the biller", other than for the period September 22nd of '95 to January of '96, was in my judgment

false testimony. It was contradicted by Shari McGowan, who testified that McGowan's only training in billing came from Marla DeVore showing her how to enter things in the computer.

It was further contradicted by Ms. McGowan testifying that DeVore gave her the EOBs that were rejected. Excuse me, her testimony that she would give the EOBs that were [170] rejected to Marla and Marla would then give a stack of EOBs back to McGowan with a sticky note or piece of paper saying to rebill.

DeVore's testimony was further contradicted by Lynda Fein. Fein said DeVore trained her, showed her how to enter the program, enter the data, and do the billing. She said if she had questions she asked Marla. She said she wasn't aware you couldn't bill Medicaid for two services in one day, and when she asked, Marla told her to bill one provider for a different and Fein did so.

Larry Alexander, who was doing billing during the time of the two counts of conviction, said that Marla DeVore told him to come to her if he had questions or needed help with billing. And she said that forcefully. He testified that Ms. DeVore reviewed the bills he prepared, at least the first few weeks he was there, before they were sent in. He testified, if a claim was rejected and I didn't know why, I would tell Marla and she would tell me what to do. He testified that DeVore told him how to interpret codes, how to fill out insurance forms, how to enter things into the computer.

Her testimony was contradicted by Kuethe who said she asked DeVore in May or June of '96 what to mark on the super bills for the SOSA group sessions, and DeVore just said mark "group."

[171] Witness Woods testified that DeVore told the others how to bill.

On the basis of all of those people's testimony, I find that her statement that until '97 she played no role in billing except to fold, mail, and sign bills, and that she was not the biller other than for the period September 22nd, '95 to January, '96, was false testimony. Further, I find that it was material to the counts of conviction because they were—those statements were willfully intended to mislead the jury into thinking she had no decision making authority in billing when clearly she did. She orchestrated the billing processes throughout that office.

In addition, her statement that she was not involved in the decision to have Woods participate in the second SOSA group was contradicted, as I've mentioned, by both Woods and to some degree by Mitrione. Mitrione said it was a group decision. Woods testified DeVore told him the group seemed to run better with him and they didn't see anything wrong with him running the group. Kuethe said both Defendants told her Woods would be a co-therapist for the group. Both told her he was qualified.

I find the statement that she was not involved in the decision to have Woods participate in the second SOSA group was knowingly false and made with the willful intent to [172] mislead the jury and was material to the issues on Counts 12 and 14. Therefore I overrule her objection to the obstruction of justice enhancement.

As to Defendant Mitrione and the obstruction enhancement, Defendant Mitrione testified that prior to 1999, he had never seen Chapter 200, of the Illinois Department of Public Aid's Medicaid Provider Handbook. He stated that his office received only Chapter 100 in 1993. That is the testimony I rely upon in giving the enhancement.

That testimony was contradicted by Cecilia Mitrione. She testified that in 1991 a representative of Public Aid went through the book, including Chapter 200 with her and Dr. Mitrione and left the book with them.

His testimony was further contradicted By Roni Kaluza, who testified that Mitrione applied to participate as a Medicaid provider on May 12th of 1991, and the Physician's Handbook including Chapter 200 was sent to him or handed to him.

His testimony was contradicted by Nancy Calumet, who testified that Mitrione attended on October 23rd, 1996, a training session for consultants for the Department of Public Aid to do peer review assessments. She said seminar participants were given the Public Aid Handbook and provision about psychiatrist billing was addressed while [173] Mitrione was present as a result of another participant's questions.

His testimony was contradicted by his office's use of billing codes, the W codes found at the end of Chapter 200.

The Court finds that his testimony was knowingly false and made with the willful intent to provide false testimony. That it was material to the issues in Counts 12 and 14 because it was designed to convince the jury that he had no knowledge that he couldn't bill Medicaid for services which those other than he had rendered.

I acknowledge that Dr. Mitrione testified also that he told unnamed staff not to bill Medicare for Woods' sessions. However, the defense was multi pronged. He also testified that he felt Woods was qualified to lead the SOSA group. That he thought he could bill Medicaid for the work of others that was done incident to his and under his personal supervision. And that the same rules for Medicare would apply to Medicaid. And that to him personal supervision included accountability and not presence.

And as to those aspects of the defense, his false testimony that he never saw or received Chapter 200 of the Public Aid Manual was material to at least those aspects. So his objection to the obstruction enhancement is overruled.

Defendant DeVore's objection and request to receive a [174] downward departure because the amount of loss overstates the seriousness of the offense is rejected because the Court has taken into consideration the reasons and need to reduce the amount of loss already.

Her objection to the failure to give her acceptance of responsibility is an amazing objection. I'm not surprised counsel didn't argue it. But since she went to trial and contested virtually everything in the case and everything in the Pre-Sentence Report, she does not deserve acceptance of responsibility credit. It is rejected. That objection is overruled.

Now, I think the remaining issue is which Guidelines should we use. The rule of thumb is the Defendants are sentenced under the Guideline manual in force when sentencing occurs. That's found at Guideline 181.11, 18 U.S.C. 3553A, and cited in U.S. versus Whitlaw, 287 F.3rd 638.

However, if use of the Guidelines in effect on the sentencing date would violate the Ex Post Facto clause of the U.S. Constitution, then we use the Guidelines in effect on the date of the offense or the last date of offense.

The Guidelines and the court cases have held that we have to use the-whole manual. We have to use all of one manual or the other. We don't pick and chose little paragraphs here and little paragraphs there. Basically the [175] Defendants get the benefit of whichever Guideline book assists them or gives them the best benefit.

As I mentioned, we've heard talk about the '97 and '98 Guidelines. Actually, it would be the '96 Guidelines. The '96 Guidelines went into effect November 1 of '96, which would encompass the two counts of conviction which occurred later in November of '96 and one in January of '97. Interestingly enough, the Guidelines were not specifically published in '96. There was a paper pamphlet of amendments which was put

out which does not seem to affect any of the provisions here. We are comparing in essence the '95 Guideline book with the 2001 Guideline book.

Also, the fraud action is encompassed in the 2001 book under Guideline 2B1.1. In the '95 Guideline book and the '96 Guidelines, fraud was encompassed under a Guideline 2F. The '96 Guidelines then which were in effect at the time of the events leading to convictions in Counts 12 and 14 had a two level enhancement for more than minimal planning or if the scheme involved more than one victim. This is found in Guideline 2F1.1(b) (2) of the '95/'96 Guidelines.

In this case, Counts 12 and 14 involved a scheme to defraud more than one victim. And I would note that the application note to this particular Guideline defines [176] victim for this Guideline purpose as the party who paid.

The evidence indicated that patient Tammy Moats was referred by Dr. Mitrione to Woods for individual counseling and SOSA group sessions. She saw Woods five or six times, but not according to her for alcohol and drug problems. She was not told his credentials. She paid cash herself for each session. Therefore, she was a victim of the scheme.

Joan Crossen attended the SOSA group lead by Woods. She was never told what his credentials were but assumed they were the same as Keuthe's. She went to eight to ten sessions and had no alcohol or drug counseling. Her insurance company, American Health Care Providers, paid for six visits to Woods. She paid a co-payment. That insurance company agreement said a CADC was a Bachelor's degreed person, and Woods wasn't. Therefore, Crossen and American Health Care Providers were victims of the scheme to defraud.

Illinois Public Aid Medicaid program was a victim. It paid for the services listed in Counts 12 and 14 to the two victims listed for the sessions performed by Woods.

Marla Ladson was a member of the SOSA group lead by Woods. She testified that she had no substance abuse problems. She was covered by Medicare. Medicare paid for her services—excuse me, her sessions with Woods. Thus [177] Medicare was a victim of the scheme.

As you can see, there are way more victims than one. So the enhancement, the two level enhancement called for under 2F1.1(b)(2) of the '96 Guidelines would be in effect.

If we go through the 2001 Guidelines and compare them to the 1996 with that enhancement, the 2001 Guidelines are clearly beneficial to each Defendant. With the 2001 Guideline we have, since we're talking about amount of loss in excess of 10,000 but less than 30,000, we have a base Offense Level of 6, an enhancement for the amount of loss of 4, a vulnerable victim enhancement of 2, as to Mitrione only an abuse of trust enhancement of 2, as to each Defendant an obstruction enhancement of 2, yielding an Offense Level for Mitrione of 16, an Offense Level for DeVore of 14.

If we use the '96 Guidelines, each would have an Offense Level of 6, an amount of loss, of 3, an enhancement since there was more than one victim of 2, a vulnerable victim enhancement of 2, for Mitrione only an abuse of trust enhancement of 2, for each an obstruction of justice enhancement of 2, yielding for Mitrione an Offense Level 17 and for DeVore an Offense Level of 15.

The 2001 Guidelines favor each Defendant, therefore we will use the 2001 Guidelines for the reasons I have just outlined.

[178] And consequently, having ruled on these objections, should there be one or two paragraphs to which there were no objections lodged, I adopt the findings set forth in those as well. And for the reasons I have outlined I find that Defendant Mitrione under the 2001 Guidelines has an Offense Level, a final Offense Level of 16. Once more it is a

base of 6, an amount of loss of enhancement of 4, a vulnerable victim enhancement of 2, an abuse of trust enhancement of 2, an obstruction of justice enhancement of 2, yielding 16. He's in Category I for Criminal History purposes, putting the Guideline range for Defendant Mitrione at 21 to 27 months.

For Defendant DeVore we have a base Guideline range of 6, an amount of loss enhancement of 4, a vulnerable victim enhancement of 2, an obstruction enhancement of 2, yielding a final Offense Level of 14. She is in Category I for Criminal History, yielding a Guideline range of 15 to 21 months.

Those are my findings as to the application Guideline range. Both are in Zone D.

Let's take fifteen. Fifteen minute break and we will address sentencing.

(Whereupon a break was taken.)

THE COURT: Okay, everybody ready? All right. Turning to issues then of sentencing. Does the Government

* * * *

[2513] establishing the existence of the scheme beyond a reasonable doubt. However, the Government is not required to prove all of them.

A scheme to defraud is a scheme that is intended to deceive and cheat another and to obtain money or property or cause the loss of money or property to another.

A scheme or device includes any plan or course of action intended to deceive others.

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or .property to Defendants or the potential loss of money or property to another.

A statement or representation is fraudulent if known to be untrue, and made or caused to be made with intent to deceive.

Good faith on the part of a Defendant is inconsistent with intent to defraud, an element of the charges. The burden is not on the Defendant to prove his or her good faith; rather, the Government must prove beyond a reasonable doubt that the Defendant acted with intent to defraud.

Counts 2, 3, 5, 7, 10, 11 and 12, charge that the Defendants committed mail fraud.

To sustain the charge of mail fraud, the Government

* * * *

[2515] The mail fraud statute can be violated whether or not there is any loss or damage to the victim of the crime or gain to the Defendants.

The Government must prove that the United States mail was used to carry out the scheme, or was incidental to an essential part of the scheme.

In order to use or cause the use of the United States mails the Defendant need not actually intend that use to take place. You must find that the Defendants knew this use would actually occur, or that the Defendants knew that it would occur in the ordinary course of business, or that the Defendants knew facts from which that use could reasonably have been foreseen.

The Defendants need not actually or personally use the mail.

Although an item mailed need not itself contain a fraudulent representation or promise or a request for money, it must further or attempt to further the scheme.

Each separate use of the mail in furtherance of the scheme to defraud constitutes a separate offense.

The Government may satisfy its burden of proof that documents were mailed by means of circumstantial evidence, so it is therefore not determinative that the. Government failed to produce the envelopes in which the documents were mailed.

* * * *

[2518] To sustain the charge of making a false, fictitious, or fraudulent claim, the Government must prove the following propositions as to each Defendant and as to each count.

First, that a Defendant knowingly presented a claim against the United States or a department or agency of the United States.

Second, that the claim was materially false, fictitious, or fraudulent.

Third, that a Defendant knew the claim was false, fictitious, or fraudulent.

And fourth, that a Defendant acted with the intent to defraud.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt regarding a Defendant as to a particular count, then you should find that Defendant guilty of that particular count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt regarding a Defendant as to a particular count, then you should find that Defendant not guilty of that particular count.

A false statement is "material" if it has a natural

* * * *

[2520] Defendant Marla DeVore acted knowingly and intentionally and with the intent to defraud in submitting bills for Medicaid reimbursement, or whether she acted under mistaken belief.

As with any other evidence, it is for you to decide whether the testimony is truthful and accurate in part, in whole, or not at all, as well as what weight, if any, you give to the testimony.

The term "health care benefit program" includes insurance companies, the Medicare program of the United States, and the Medicaid program of the United States and the State of Illinois.

Count 14 of the indictment charges the Defendants with a crime of health care fraud.

To sustain the charge of health care fraud, the Government must prove the following propositions:

First, that the Defendants executed or attempted to execute a scheme and artifice to defraud a health care benefit program.

Second, that the Defendants did so in connection with the delivery of or payment for health care benefits, items, and services.

And third, that the Defendants did so knowingly and intentionally.

If you find from your consideration of all the

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(3)

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No. 03-1668

In the Supreme Court of the United States

ROBERT T. MITRIONE AND MARLA A. DEVORE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Each petitioner was found guilty by a jury on multiple criminal charges involving Medicaid and Medicare fraud. Based on newly discovered evidence that a prosecution witness had committed perjury at trial, the district court granted petitioners' subsequent motion for a new trial on most of the counts of conviction. The court denied the motion, however, with respect to two of the counts of conviction, on the ground that the perjured testimony was unrelated to those charges. The questions presented are as follows:

1. Whether the district court erred in denying petitioners' motion for a new trial with respect to two of the counts of conviction.

2. Whether petitioners' convictions on mail fraud and false claim charges should be reversed because those counts incorporated by reference allegations concerning the scheme to defraud that were contained in counts of the indictment as to which the district court granted petitioners' motion for a new trial.

3. Whether the conduct underlying the two counts of conviction that the district court allowed to stand, which involved the submission of reimbursement claims for services that were performed by a non-physician assistant, violated either state or federal law.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 357 F.3d 712. The opinion of the district court (Pet. App. 18a-22a) is reported at 160 F. Supp. 2d 993.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2004. A petition for rehearing was denied on March 25, 2004 (Pet. App. 50a). The petition for a writ of certiorari was filed on June 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioners

were found guilty of conspiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); mail fraud, in violation of 18 U.S.C. 1341 (Mitrione: Counts 2, 3, 5, 10-12; DeVore: Counts 3, 5, 10-12); filing false claims, in violation of 18 U.S.C. 287 (Mitrione: Counts 6, 9 and 14; DeVore: Counts 4, 9, and 14); and health care fraud, in violation of 18 U.S.C. 1347 (Count 15). See Pet. App. 23a-39a (indictment).[1] Petitioners subsequently filed a motion for new trial based on newly discovered evidence. The district court denied the motion as to Counts 12 and 14, but granted it as to the remaining counts. The government elected not to retry petitioners on the charges as to which a new trial had been granted. With respect to Counts 12 and 14, petitioner Mitrione was sentenced to 23 months of imprisonment, to be followed by three years of supervised release. Petitioner DeVore was sentenced to 15 months of imprisonment, to be followed by three years of supervised release. Each petitioner was ordered to pay restitution in the amount of $11,255.65. The court of appeals affirmed. *Id.* at 1a-17a.

1. Mitrione, a psychiatrist, and DeVore, his office manager, were indicted on charges of fraud in connection with their receipt of payments under the Medicaid and Medicare programs. The alleged fraud involved billing for services that were not provided (ghost billing), overstating services that were provided (upcoding), and billing for services performed by others while declaring that the services were provided by Mitrione personally (substitute billing). Pet. App. 1a.

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[1] Petitioner Mitrione was acquitted of one count of mail fraud and one count of filing false claims. Petitioner DeVore was acquitted of counts of mail fraud and two counts of filing false claims. The government dismissed one mail fraud count.

In the early 1990's, Mitrione established a psychiatric practice in Springfield, Illinois. The following year, he applied to become a Medicaid provider with the Illinois Department of Public Aid (IDPA), which administers the Medicaid program in Illinois. Mitrione agreed to comply with Illinois Medicaid policies set forth in the applicable medical assistance handbooks. One such policy was that physicians could be paid under Illinois Medicaid only for psychiatric services personally provided by the physician and that services rendered by a psychologist or social worker were not reimbursable. Pet. App. 2a-3a.

Mitrione was also enrolled as a provider with the Medicare Part B system, which (like Medicaid) is a "fee for service" program. Unlike Illinois Medicaid, Medicare allows providers under certain circumstances to obtain reimbursement for psychological services that are performed by delegees rather than by the physician personally. Medicare regulations require, *inter alia*, that those services be performed under the direct supervision of the physician. The Medicare manual states that, in order to fulfill the "direct supervision" requirement, a physician must be present in the same office so that he can intervene if an emergency arises. Even if a physician is present, the Medicare rules do not allow payment for the services of unlicensed mental health providers. Pet. App. 3a.

In September 1994, Mitrione brought DeVore into his practice as a new officer manager. Petitioners instituted a policy of billing IDPA for services performed by nonphysicians, while causing their billing clerks to substitute Mitrione's name for that of a nonphysician on the claim forms sent to IDPA. DeVore reviewed the claims before they were sent to Medicare, IDPA, or various insurance companies. Pet. App. 3a-4a.

In 1995, Mitrione hired nonphysicians to provide counseling services to his practice's clients. Mitrione provided medication management, and he referred the patients to the counselors for individual psychotherapy. Medicaid and Medicare paid less for medication management sessions than for more time-consuming psychotherapy sessions. Mitrione and DeVore repeatedly billed Medicare for lengthy psychotherapy sessions when only medication management services were actually provided. That conduct formed the basis for the "upcoding" charges in the indictment. See Pet. App. 5a; Gov't C.A. Br. 13.

Mitrione hired Terry Goff, an unlicensed intern working on his advanced psychology degree, and Walter Woods, a drug and alcohol counselor. Although neither Woods nor Goff was licensed to provide mental health services, both were assigned to counsel Medicaid patients. Petitioners billed for the services provided by Woods and Goff as though Mitrione had either provided or directly supervised those services. That conduct formed the basis for the substitute billing charges set forth in Counts 12 and 14 of the indictment. Pet. App. 5a-6a.

Petitioners also submitted claims to IDPA and Medicare for services that were not rendered at all—conduct that formed the basis for the "ghost billing" charges. DeVore instructed Goff to document telephone sessions with clients (which were not reimbursable by IDPA and Medicare) as if they were face-to-face sessions, and then bill for those sessions. IDPA and Medicare also refused to pay for missed or cancelled appointments; DeVore billed for sessions when the records established that the session did not occur. Additionally, IDPA would not pay for two services on a single date. When clients saw both DeVore for counsel-

ing and Mitrione for medication management on the same date, DeVore instructed her billing clerks to bill as if the client had been seen by Mitrione on two different dates. Gov't C.A. Br. 14-15.

2. Before trial, petitioners moved for a partial dismissal of the indictment. They argued that all references to substitute billing as a fraudulent billing scheme should be struck from the indictment because substitute billing did not violate state or federal law. Pet. App. 18a. Petitioners contended that a handbook provision (Section A-210.7 of IDPA's Medical Assistance Program Handbook) cited in Count 2 of the indictment (see Pet. App. 29a), which states that reimbursement for psychiatric services is available under Illinois Medicaid rules only for services personally provided by the physician who submits the bill, did not have the force of law.

The district court denied the motion to dismiss. Pet. App. 18a-22a. The court agreed with petitioners that the handbook is an interpretive document and does not have the force of law. *Id.* at 19a. The court determined, however, that the relevant handbook provision reflected a correct interpretation of the Illinois Administrative Code, which is legally binding. *Id.* at 19a-20a. Based on its analysis of the pertinent Illinois Administrative Code provisions, the court concluded that, "[f]or Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision." *Id.* at 20a.

3. The jury found petitioners guilty on the majority of the charges contained in the indictment, including the substitute billing charges set forth in Counts 12 and 14. Petitioners subsequently filed a motion for a new trial, based upon newly discovered evidence that

Deanna Statler, an IDPA auditor who had testified as a rebuttal witness for the government, had committed perjury at trial.

The district court granted the motion with respect to all counts of conviction except for Counts 12 and 14. See Pet. App. 8a-9a, 40a-49a. After concluding that Statler had given false testimony, the district court turned to the question "whether Ms. Statler was a material witness for the Government at trial." *Id.* at 44a. The court held that Statler was a material witness with respect to the ghost billing and upcoding charges. The court explained that "[t]he defense to these charges was that the [petitioners] were inept and ignorant of proper billing procedures and made many mistakes in billing, but that these mistakes were not intentionally made or made with the intent to defraud." *Ibid.* The court found that Statler's rebuttal testimony was a significant part of the government's efforts to refute that defense. *Id.* at 44a-45a. The court concluded that "as to the ghost billing and upcoding charges the verdicts might have been different" if Statler had not testified or if the jurors had known that her testimony was false, *id.* at 45a, and on that basis it granted the motion for a new trial on those charges, *id.* at 46a. The district court denied the motion for a new trial with respect to Counts 12 and 14, however, finding that Statler's testimony "did not go to those two counts." *Id.* at 47a; see *id.* at 46a-48a.

4. The government declined to retry petitioners on the counts as to which the district court had granted the motion for a new trial. Petitioners appealed their convictions and sentences on Counts 12 and 14 of the indictment. The court of appeals affirmed. Pet. App. 1a-17a.

a. The court of appeals first observed that, in determining whether post-trial evidence of perjury by a government witness entitles a criminal defendant to a new trial, the Seventh Circuit has traditionally used the test it adopted in *Larrison* v. *United States*, 24 F.2d 82 (1928). Pet. App. 9a. Under the *Larrison* test, a new trial is granted in such cases if, without the false testimony, "the jury *might* have reached a different conclusion." *Larrison*, 24 F.2d at 87; see Pet. App. 9a. The court of appeals explained that the *Larrison* test "puts [the Seventh Circuit] at odds with other circuits which, absent a finding that the government knowingly sponsored the false testimony, require a defendant seeking a new trial to show that the jury would *probably* have reached a different verdict had the perjury not occurred." *Ibid.* (citing cases). The court overruled its prior decision in *Larrison* and adopted the reasonable probability test used by the majority of other circuits. See *id.* at 10a.

b. Applying the reasonable probability standard, the court of appeals affirmed the district court's denial of petitioners' new trial motion with respect to the substitute billing counts. Pet. App. 10a-11a. The court explained that "Statler was really not a material witness with respect to the substitute billing counts" because "Statler did not testify about the propriety of substitute billing or the [petitioners'] knowledge that such claims were prohibited. Rather, she testified about the frequency of ghost billing and upcoding." *Id.* at 10a. The court also rejected petitioners' contention that Statler's testimony might have affected the verdict on the substitute billing counts by diminishing petitioners' overall credibility in the eyes of the jurors. The court explained that the government had "presented substantial evidence that the [petitioners] knew they were en-

gaging in impermissible substitute billing." *Ibid.* Based on its review of the trial record, the court "d[id] not believe that the jury would have probably reached a different verdict on the substitute billing counts had Statler's testimony not been presented." *Id.* at 10a-11a.

ARGUMENT

1. Petitioners contend (Pet. 9-19) that the Court should grant review to resolve a conflict among the circuits on the standard for granting a motion for a new trial based on evidence of perjury by a government witness. The Fourth and the Sixth Circuits, relying on the Seventh Circuit's decision in *Larrison*, have held that a new trial should be granted in such cases if, without the false testimony, the jury "might" have reached a different conclusion. See *United States* v. *Wallace*, 528 F.2d 863, 866 (4th Cir. 1976) (adopting *Larrison* standard); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949) (adopting *Larrison* standard), cert. denied, 339 U.S. 935 (1950); see also *United States* v. *Roberts*, 262 F.3d 286, 293 (4th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Willis*, 257 F.3d 636, 642-645 (6th Cir. 2001). Every other circuit to consider the issue, including the Seventh Circuit in this case, has held that a new trial is warranted only if the new evidence would probably produce a different verdict. See Pet. App. 10a-11a; *United States* v. *Petrillo*, 237 F.3d 119, 123 (2d Cir. 2000); *United States* v. *Williams*, 233 F.3d 592, 593-595 (D.C. Cir. 2000); *United States* v. *Huddleston*, 194 F.3d 214, 217-221 (1st Cir. 1999); *United States* v. *Sinclair*, 109 F.3d 1527, 1531-1532 (10th Cir. 1997); *United States* v. *Provost*, 969 F.2d 617, 622 (8th Cir. 1992), cert. denied, 506 U.S. 1056 (1993); *United States* v. *Krasny*, 607 F.2d 840, 844-845

(9th Cir. 1979), cert. denied, 445 U.S. 942 (1980). In a recent unpublished opinion, the Fifth Circuit also declined to apply the *Larrison* rule, noting that the Seventh Circuit in this case had overruled *Larrison*. *United States* v. *Owens*, 96 Fed. Appx. 199, 200-201 (2004).

The Fourth and the Sixth Circuits initially adopted the *Larrison* standard before this Court's holding in *United States* v. *Agurs*, 427 U.S. 97, 103 (1976), that convictions based on the knowing use of perjured testimony may be overturned only if there is a "reasonable likelihood" that the false testimony affected the verdict. Accord *Kyles* v. *Whitley*, 514 U.S. 419, 433 n.7 (1995). Since *Agurs*, no court of appeals has adopted the *Larrison* standard. Even before the Seventh Circuit's overruling of *Larrison* in this case, there had been "an unmistakable trend toward use of the probability standard" among the courts of appeals. *Huddleston*, 194 F.3d at 220. As the Seventh Circuit observed in *United States* v *Mazzanti*, 925 F.2d 1026, 1029 (1991), "[t]he difference between *Larrison* and the more general formulation has become, over the years, more and more elusive, and * * * the differences in practical application are indeed becoming difficult to discern." This Court has recently denied other petitions for a writ of certiorari presenting the question whether the *Larrison* test or the probability standard is appropriate in these circumstances. See *Germosa* v. *United States*, 531 U.S. 1080 (2001); *Williams* v. *United States*, 529 U.S. 1131 (2000). There is no reason for a different result here.

Contrary to petitioners' contention (Pet. 11), moreover, there is no reason to suppose that petitioners would have been granted a new trial on the substitute billing counts even if the court of appeals had applied

the *Larrison* standard. Consistent with *Larrison* (which was binding precedent within the Seventh Circuit at the time of the district court's ruling), the district court framed the relevant inquiry as "whether the verdicts *might have been different* either without the trial testimony of Ms. Statler, or if the jury had known that part of Ms. Statler's testimony was false." Pet. App. 45a (emphasis added); see *id.* at 48a (district court states that it is "giving the benefit of the doubt to the [petitioners] in any instance where a charge was based in whole or in part on evidence where the verdict might have been influenced by the false testimony"). Applying that standard, the district court granted petitioners' motion for a new trial with respect to most counts of conviction, but denied the motion with respect to the substitute billing charges contained in Counts 12 and 14. See *ibid.* Nothing in the court of appeals' opinion suggests that the Seventh Circuit would have granted petitioners more extensive relief if it had applied the *Larrison* standard.

Petitioners also argue (Pet. 12-13) that the *Larrison* standard should apply in this case because Statler was a "member of the prosecution team." Petitioners did not advance that claim below, however, and the lower courts therefore had no occasion to address it. In any event, the fact that Statler discussed her testimony and the accompanying trial exhibit with government counsel (see Pet. 13) does not establish that Statler—an auditor with the Illinois Department of Public Aid—was a member of the prosecution team, such that knowledge of her perjury could be attributed to the government.

Petitioners also contend (Pet. 14) that the test used by the court of appeals in this case conflicts in principle with the materiality standard applied by this Court

when the prosecution has concealed exculpatory material in violation of the rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court found, however, that government counsel "did not knowingly put false testimony on at trial," Pet. App. 46a, and petitioners did not contest that finding on appeal. The government's lack of prior knowledge of the pertinent newly discovered evidence distinguishes this case from *Brady* and its progeny.

Even under the *Brady* standard, moreover, petitioners would not be entitled to relief. This Court has held that undisclosed exculpatory or impeachment evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). The Court has explained that "[a] 'reasonable probability' of a different result is * * * shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). In this case, Statler's perjury does not undermine confidence in the guilty verdicts on the substitute billing counts, because, as the courts below correctly found, Statler was not a material witness with respect to those counts.[2]

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[2] Petitioners contend (Pet. 15) that the practical effect of the standard applied by the court of appeals was to require them to demonstrate that, without Statler's testimony, "there would not have been enough left to convict" on the substitute billing counts. That is incorrect. Requiring the defendant to show that the jury's verdict would *probably* have been different if perjured testimony had been excluded is not the same as requiring proof that no reasonable jury *could* have found the defendant guilty without the false testimony. Petitioners' reliance (Pet. 15-16) on *Mesarosh* v.

2. Petitioners argue (Pet. 20-24) that the reversal of their convictions on Counts 1 and 2 rendered their convictions on Counts 12 and 14 fundamentally unfair because the latter counts incorporated by reference the scheme to defraud alleged in Counts 1 and 2. That claim lacks merit and does not warrant this Court's review.

Counts 12 and 14, which charged petitioners with mail fraud and health care fraud, incorporated by reference paragraphs 1 through 13 of Count 1 (conspiracy to defraud the United States) and paragraphs 1 through 8 of Count 2 (mail fraud). See Pet. App. 28a, 36a, 38a. The incorporated portions of those counts provided background information concerning the Medicaid and Medicare programs, and set forth the factual averments regarding the scheme to defraud those programs (an essential element of mail fraud). The fact that certain general background facts were relevant to many of the charges contained in the indictment does not undermine the lower courts' determination that Statler's testimony bore only on the ghost billing and upcoding charges, not on the substitute billing counts.

Petitioners also invoke the principle that "a conviction must be reversed when it is based on alternative legal theories, one of which is legally erroneous, and it

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United States, 352 U.S. 1 (1956), is also misplaced. In *Mesarosh*, this Court granted the defendants a new trial when the government acknowledged on appeal that its informant-witness had given false testimony in similar cases. See *id.* at 8-9. In *Mesarosh*, however, this Court found that "it cannot be determined conclusively by any court that [the witness's] testimony was insignificant in the general case against the defendants." *Id.* at 10-11. Here, by contrast, both the district court and the court of appeals found that Statler's testimony was not germane to the substitute billing charges.

is not possible to know the basis of the jury's decision." Pet. 20. That rule is irrelevant to this case. Petitioners do not contend that the jury was improperly instructed, nor do they suggest any other ground for inferring that the jury relied on an erroneous *legal* theory. Petitioners' contention (Pet. 23-24) that they were deprived of their right to trial by jury also lacks merit. A properly instructed jury considered the relevant evidence and found petitioners guilty on the substitute billing charges. Petitioners' request for a new trial based on newly discovered evidence necessarily required the courts below to determine what verdict the jury would likely have reached if it had not relied on Statler's perjured testimony. Nothing in this Court's decisions suggests that the district court and court of appeals invaded the jury's province by engaging in that inquiry.

3. Petitioners contend (Pet. 24-30) that federal Medicare regulations mandate reimbursement when a physician allows an assistant to perform a covered service and that such regulations preempt the Illinois Medicaid regulations that proscribe billing for psychiatric services rendered by anyone other than the physician who submits the charges. That claim lacks merit and does not warrant further review.

The Medicaid program established in 1965 by Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program to provide medical care to needy individuals. See, *e.g.*, *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Atkins* v. *Rivera*, 477 U.S. 154, 156 (1986). States that elect to participate must comply with requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services (HHS) in his administration of the Act. See 42 U.S.C. 1396a (2000 & Supp. I 2001); *Wilder*, 496 U.S. at

502; *Rivera*, 477 U.S. at 157. Thus, a State participating in the Medicaid program must provide reimbursement for physicians' services. 42 U.S.C. 1396a(a) (2000 & Supp. I 2001), 1396d(a)(5).

As this Court has made clear, however, "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal* v. *Doe*, 432 U.S. 438, 444 (1977). Rather, the Act requires only that a state Medicaid plan establish "reasonable standards * * * for determining * * * the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX]." *Id.* at 441 (quoting 42 U.S.C. 1396a(a)(17)). As the Court observed in *Beal*, the statutory language "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Id.* at 444.

"For Medicaid reimbursement for psychiatric services, Illinois requires that the services actually be provided by the physician and not by members of his staff under his direct supervision." Pet. App. 20a; see *id.* at 13a. That standard is a reasonable means of ensuring that public funds are not expended for psychiatric services performed by persons who lack adequate qualifications. Nothing in federal law prevents the State from limiting Medicaid reimbursement in that manner.

Petitioners also argue (Pet. 25-26) that, because the Medical Assistance Program Handbook published by the Illinois Department of Public Aid does not have the force of law, petitioners' non-compliance with the standards set forth in the handbook cannot form the basis for criminal liability. As the courts below correctly rec-

ognized (Pet. App. 13a, 19a-21a), however, the handbook correctly construes Section 140.413 of the Illinois Administrative Code, title 89 (1997 & Supp. 2004), which is legally binding. Section 140.413 requires that, in order to obtain reimbursement for psychiatric services under the Illinois Medicaid program, a physician must perform the services personally rather than delegating their performance to a member of his staff. Because petitioners do not challenge that interpretation of the Illinois Administrative Code, the precise legal status of the handbook is irrelevant to the proper disposition of this case.

Finally, the specific billings that underlay Counts 12 and 14 of the indictment were for services that would not have been reimbursable even under federal regulations governing the Medicare program. Those billings involved Woods's leadership of a support group for survivors of sexual abuse on November 14, 1996, when petitioners "were either in Texas or had just returned home from Texas and were not in the office." Pet. App. 46a-47a. Although federal Medicare regulations permit reimbursement for some psychological services performed by non-physician subordinates, the services performed by Woods on that date would not have been reimbursable under the Medicare rules, both because no physician was present in the office at the time, and because Woods was not licensed to provide the mental health services that leadership of the support group entailed. See *id.* at 3a, 5a-6a, 46a-47a. Petitioners are therefore wrong in asserting that "Medicare mandates reimbursement where, as here, the physician in his discretion used this assistant." Pet. 25. The impropriety of the relevant billings even under the Medicare rules further undermines petitioners' contention that

the application of state law in this setting subjected them to unfair surprise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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